INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	3
Statement	3
Reasons for granting the writ	5
Conclusion	12
Appendix	13

CITATIONS

Cases:

Blair v. *Illinois Steel Co.*, 159 Ill. 350, 358–360	10
Chapman v. *American Surety Co.*, 261 Ill. 594, 602–606	10
Chatham v. *Mecklenburg Realty Co.*, 180 N. C. 500, 502, 503	10
City Insurance Co. v. *Commercial Bank*, 68 Ill. 348, 350, 351	7
Clapp v. *Peterson*, 104 Ill. 26, 35	3
Clarkson v. *E. & N. S. Dispatch*, 6 Ill. App. 284	7
Consolidated Coal Co. v. *Flynn Coal Co.*, 274 Ill. App. 405	11
C. T. C. Inv. Co. v. *U. S.*, 108 F. (2d) 383 (C. C. A. 7th)	4
C. T. C. Inv. Co. v. *London & Lancashire Indemnity*, 116 F. (2d) 741 (C. C. A. 7th)	4
DeLong v. *Jefferson Standard Life Ins. Co.*, 109 F. (2d) 585, 586 (C. C. A. 5th), cert. den., 310 U. S. 635	11
Eads v. *Mason*, 16 Ill. App. 545, 547, 548	10
Edwards v. *Schillinger*, 245 Ill. 231, 244	3
Erie Railroad Co. v. *Tompkins*, 304 U. S. 64	6
Gottlieb v. *Miller*, 154 Ill. 44	7
Grimes v. *Hilliary*, 38 Ill. App. 246, 247, 248	10
Henry v. *Jewett*, 94 Ill. App. 667, 669, 670	7
Hess v. *Voss*, 52 Ill. 472, 476, 477	10
Hill v. *Gruell*, 42 Ill. App. 411, 420, 421	3, 7, 9, 10, 11
Hollins v. *Brierfield Coal & Iron Co.*, 150 U. S. 371	4
Howe v. *Robinson*, 20 Fla. 352, 355–357	10
Ill. Life Ins. Co. v. *Chicago*, 244 Ill. App. 185, 199, 200	10
Johnson v. *Canfield-Swigart Co.*, 292 Ill. 101	7
Labadie v. *Hewitt*, 85 Ill. 341, 342, 343	10
Life Association of America v. *Fassett*, 102 Ill. 315, 323	7
Lindemann v. *Rusk*, 125 Wis. 210, 229–232	10
Malloy v. *New York Life Ins. Co.*, 103 F. (2d) 439, 445 (C. C. A. 1st), cert. den., 308 U. S. 572	11
McDowell v. *Cochran*, 11 Ill. 31, 33	10

Cases—Continued. Page

McNab v. *Heald*, 41 Ill. 326, 330–332 10
New York Life Ins. Co. v. *Jackson*, 98 F. (2d) 950, 952 (C. C. A. 7th), cert. den., 305 U. S. 640 11
Phillips v. *Commissioner of Internal Revenue*, 283 U. S. 589, 603, 604 3
Ruhlin v. *New York Life Ins. Co.*, 304 U. S. 202 6
Shippert v. *Shippert*, 371 Ill. 267, 270, 271 10
Singer v. *Hutchinson*, 183 Ill. 606, 618, 620 ..... 3, 7
Smith v. *Railroad Co.*, 99 U. S. 398 6
State ex rel. Pabst v. *Circuit Court*, 184 Wis. 301, 307 10
State and Watson, Trustee v. *Bank of Tennessee*, 64 Tenn. (5 Baxt.) 101, 107–114 10
Steere v. *Hoagland*, 39 Ill. 264, 265–267 10
Tarbell v. *Page*, 24 Ill. 46, 67 7
Wheeler v. *Pullman Iron & Steel Co.*, 143 Ill. 197, 204 7
Wilson v. *Illinois Trust & Savings Bank*, 166 Ill. 9, 13, 14 10

Statutes:
Illinois Corporation Act (1919), Sec. 14 ..... 3, 8, 13
Illinois Corporation Act (1919), Sec. 53 ..... 3, 8, 13
Illinois Corporation Act (1919), Sec. 79 ..... 3, 8, 11, 14
Illinois Chancery Act, Sec. 49 ..... 3, 9, 10, 14
Public Laws of Illinois (1869), Secs. 1, 2, 3 15
Hurd's Ill. Rev. Stat. (1917), Ch. 32, Secs. 10, 11, 12, 25 16
Ill. Rev. Stat. (1939), Ch. 32, Secs. 86, 94, Par. 157.86, 157.94 17
Rev. Stat. Ill. (1845), Ch. XXI, Secs. 36, 37, p. 97 18

Miscellaneous:
Reconstruction Finance Corporation Seven-Year Report To The President and The Congress of the United States, dated Feb. 2, 1939, p. 4 3

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. ——

RECONSTRUCTION FINANCE CORPORATION, PETITIONER

v.

LUCIUS TETER ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, Reconstruction Finance Corporation, respectfully prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Seventh Circuit, entered in the above cause on January 4, 1941, affirming the decree of the District Court which dismissed petitioner's amended complaint and quashed the summons issued against the C. T. C. Investment Company, named as a defendant to the amended complaint.

OPINIONS BELOW

There is no written or printed opinion of the District Court. The opinion of the Circuit Court of Appeals (R. 204–221) is reported in 117 F. (2d) 716.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on January 4, 1941 (R. 222). A petition for rehearing was filed on January 20, 1941, and denied on February 26, 1941 (R. 223). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The petitioner as a creditor brought suit to recover against the assets of a dissolved corporation which had passed into the possession of a former officer for administration and liquidation. The principal question presented is whether under Illinois law a court of equity may administer those assets as a trust fund for the benefit of creditors or whether such relief, long recognized by Illinois decisions, is precluded or limited by the provisions of certain Illinois statutes which prescribe a procedure, during a specified period after dissolution, for rights against the corporation, its officers, and stockholders.[1]

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[1] In addition to the above question there is the further question of whether the Circuit Court of Appeals erred in holding that the action failed as a representative suit because of petitioner's failure to allege that the stockholders of the C. T. C. Investment Company were so numerous as to make it impracticable to join them (R. 218). In the argument on the merits, if the petition is granted, petitioner will urge that the admission made in the brief filed in the Circuit Court of Appeals by one group of the respondents that there are

STATUTES INVOLVED

The statutes directly involved are Sections 14, 53, and 79 of the 1919 Illinois Corporation Act, and Section 49 of the Illinois Chancery Act. These sections are set out in the Appendix, *infra*, pp. 13–15. Indirectly involved are similar or identical sections of prior and subsequent acts. These sections are also set out in the Appendix, *infra*, pp. 15–19.

STATEMENT

In 1932 petitioner lent $90,000,000 to the Central Republic Bank and Trust Company of Chicago, Illinois, in order to enable the bank to meet persistent runs by its depositors (R. 57, 121).[2] To secure the loan, the bank pledged to petitioner, among other collateral, certain notes, the payment of which was guaranteed by the C. T. C. Investment Company (R. 122–123).

The C. T. C. Investment Company, an Illinois corporation, was incorporated in June 1929 (R.

"hundreds of stockholders" is binding upon respondents and makes unnecessary the missing allegation. This ruling of the court below, even if correct, does not dispose of the principal questions. Even if the action fails as a representative suit, it is good as against the defendants actually joined. It is not necessary to join all of the stockholders. *Hill* v. *Gruell*, 42 Ill. App. 411, 420, 421; *Singer* v. *Hutchinson*, 183 Ill. 606, 618, 620; *Clapp* v. *Peterson*, 104 Ill. 26, 35; *Edwards* v. *Schillinger*, 245 Ill. 231, 244; *Phillips* v. *Commissioner of Internal Revenue*, 283 U. S. 589, 603, 604.

[2] See also *Reconstruction Finance Corporation Seven-Year Report to the President and the Congress of the United States*, dated February 2, 1939, p. 4.

180), and dissolved on May 20, 1933 by decree of the Superior Court of Cook County, Illinois, for failure to file annual reports and pay its franchise taxes (R. 125, 181). Dissolution was effected by a bill brought in that court by the People on the relation of the Attorney General, to which the Company was the sole defendant. The decree entered merely ordered the Company's dissolution, and made no provision for the liquidation and distribution of its assets among its creditors (R. 179–181).

At the time of its dissolution, the Company had assets consisting largely of notes, bonds, and securities (R. 125), including an agreement of indemnity running to it and executed by certain individuals who were also stockholders of the Company (R. 125, 159). Its remaining assets, which are substantial, are being administered in the name of C. T. C. Investment Company by one Joseph Duner, a former officer of the Company (R. 125).

The C. T. C. Investment Company continued to act as a corporation long after its dissolution. In 1938 it sued the United States for a refund of certain taxes. See *C. T. C. Inv. Co.* v. *United States,* 108 F. (2d) 383 (C. C. A. 7th). Subsequently it sued an indemnity company on a certain guaranty allegedly executed by the defendant company. *C. T. C. Inv. Co.* v. *London & Lancashire Indemnity Co.,* 116 F. (2d) 741 (C. C. A.

7th). In both of these cases the C. T. C. Investment Company sued as a corporation, and in both cases it was alleged under oath that the C. T. C. Investment Company was a corporation organized and existing under the laws of the State of Illinois.

In 1939 to recover upon the guaranties of the aforesaid notes pledged by the bank (R. 126–127), on which there remained unpaid the principal sum of $1,112,420.97, together with interest (R. 124), petitioner filed suit in the District Court (R. 2, 110). Among the defendants named were the C. T. C. Investment Company and Joseph Duner, and the individuals who executed the indemnity agreement referred to above (R. 2, 3, 110).

Motions to dismiss the amended complaint and to quash the summons issued against the C. T. C. Investment Company were sustained, and the summons was quashed and the amended complaint dismissed (R. 192–193). The Circuit Court of Appeals affirmed (R. 204–222).

REASONS FOR GRANTING THE WRIT

1. The decision below seems in flat contradiction of the Illinois law that the assets of a dissolved corporation are a trust fund for the benefit of creditors and stockholders. The court stated "that in the earlier years of our jurisprudence considerable loose language was used with respect to trusts in cases such as this" (R. 215). The court, however, found that the later decisions of this Court in *Hollins* v. *Brierfield Coal and Iron*

Co., 150 U. S. 371, and *Smith* v. *Railroad Company,* 99 U. S. 398, so modified the trust fund doctrine that it could no longer be used to preserve the rights of creditors. It held that "these decisions are controlling" (R. 217).[3] Whatever the application of those decisions to a case such as this,[4] we had thought it settled that a Circuit Court of Appeals must seek its authorities from the state court and not from this Court when the question is the rights of creditors of a dissolved corporation. *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64; *Ruhlin* v. *New York Life Ins. Co.,* 304 U. S. 202. The failure of the court below to ascertain and apply the law of Illinois warrants review by this Court.

2. It is the rule in Illinois that upon the dissolution of a corporation its assets become a "trust

[3] Buried in nine paragraphs of discussion and quotation from the decisions of this Court (R. 215–217) is a "see also" citation of two Illinois decisions (R. 217). Apart from the fact that these cases were misinterpreted (*infra,* p. 7), it seems evident that the court below paid only perfunctory attention to the Illinois cases.

[4] Neither of the cases dealt with a dissolved corporation, and in neither of them was the Court concerned with the question of reaching assets which had passed to the stockholders or others upon dissolution. In both of them, the Court merely held that a simple contract creditor could not maintain an action to reach his corporate debtor's assets without first securing a judgment, or at least, a lien. Such a question is basically different from that of reaching assets of which the corporation has become divested by dissolution, and which have passed upon dissolution to the stockholders or others as transferees of the corporation.

fund" to be administered, first, for the benefit of creditors, and, second, for the benefit of stockholders. Recovery on such basis was allowed in *Hill* v. *Gruell*, 42 Ill. App. 411; *Singer* v. *Hutchinson*, 183 Ill. 606; and *Clarkson* v. *E. & N. S. Dispatch*, 6 Ill. App. 284. See also *Wheeler* v. *Pullman Iron & Steel Co.*, 143 Ill. 197, 204; *Tarbell* v. *Page*, 24 Ill. 46, 47; *Life Association of America* v. *Fassett*, 102 Ill. 315, 323; *City Insurance Co.* v. *Commercial Bank*, 68 Ill. 348, 350, 351; *Clapp* v. *Peterson*, 104 Ill. 26, 31, 32, 34; *Henry* v. *Jewett*, 94 Ill. App. 667, 669, 670. The doctrine has never been denied or repudiated by the Illinois courts.

The court below cited *Gottlieb* v. *Miller*, 154 Ill. 44, and *Johnson* v. *Canfield-Swigart Co.*, 292 Ill. 101. Neither of those cases denied the doctrine, but on the contrary expressly recognized it.[5]

The contrary decision of the court below that Sections 14, 53, and 79 of the 1919 Illinois Cor-

[5] *Gottlieb* v. *Miller* involved an insolvent and not a dissolved corporation. The contest was not between creditors and stockholders; it was among the creditors themselves. The court merely held that the "trust fund" doctrine did not prohibit an insolvent corporation from preferring one creditor over another. *Johnson* v. *Canfield-Swigart Co.* also involved an insolvent, not a dissolved, corporation. The court held that a sale of "all the capital and assets of the corporation and a division thereof among the stockholders after the payment of all debts due the stockholders from the corporation and without payment of the other debts owed by it" was fraudulent as to its other creditors. The court expressly recognized the "trust fund" doctrine, but held that upon the facts fraud was the proper ground of recovery.

poration Act and Section 49 of the Chancery Act,[6] all *infra,* provide an exclusive method is a serious inroad on the rights afforded creditors of Illinois corporations, particularly since dissolution can take place in Illinois without a judicial liquidation and distribution of the corporation's assets,[7] and without notice to creditors or other interested parties by publication or otherwise.

It seems plain, both on principle and under the Illinois decisions, that the statutory rights of creditors of a dissolved corporation are not exclusive. In substance, Section 14 extended the corporate capacity for two years after dissolution; Section 53 provided that upon dissolution any creditor could bring suit against all persons liable for the corporation's debts by joining the corporation in such suit; Section 79 provided that dissolution should not take away any remedy against a corporation, its officers or stockholders, for any liability incurred prior to dissolution if suit should be brought and service had within two years after

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[6] Although this case arises under the 1919 Illinois Corporation Act, the relevant provisions of that Act have been carried forward in the 1933 Act which is the Act presently in force. The relevant sections of both Acts are set out in the Appendix, *infra.*

[7] This is true under both the 1919 and 1933 Acts. Ill. Rev. Stat. 1931, Ch. 32, Secs. 118–124; Ill. Rev. Stat. 1939, Ch. 32, Secs. 82–86, 94, Par. 157.82–86, 157.94.

The C. T. C. Investment Company was dissolved without notice to creditors and there has not been a judicial liquidation and distribution of its assets among its creditors (*supra,* p. 4).

dissolution; and Section 49 of the Chancery Act provided that a judgment creditor with execution returned unsatisfied could bring suit to reach the judgment defendant's assets by joining the judgment defendant as a party to such suit.

Hill v. *Gruell,* 42 Ill. App. 411, specifically held that the statutes were not exclusive.[8] That case involved an action upon the "trust fund" doctrine by a creditor against the stockholders of a dissolved Illinois corporation to recover the assets they had received or the value thereof. The court, in overruling objections that the plaintiff had failed to comply with many of the applicable statutory provisions, said (p. 418) that the objections were based on a misapprehension of the character of the suit, and further said (p. 419):

> It can hardly be necessary to cite authority for the proposition that corporations are trustees of their assets primarily for their creditors; that the right of stockholders, upon a dissolution, is limited to their proportionate shares of the assets remaining after the payment of all the corporate debts; that of whatever they receive on distribution before such payment, they thereby become like trustees; that a creditor may charge as

[8] At the time of the decision (1891) and at the time the suit arose (1878), there were in force Section 49 of the Chancery Act and sections practically identical to Sections 14, 53, and 79 of the 1919 Illinois Corporation Act, except that no time was prescribed for suits against the corporation, its officers and stockholders, after dissolution.

> such any or all into whose hands he can trace assets so distributed; that a creditor, for that purpose, is anyone who has a valid claim against the corporation arising on contract express or implied, whether legal or equitable, a lien or not a lien, due or becoming due, ascertained or to be ascertained; and that a court of equity in this State has power as such and independent of statute, to enforce that trust according to its practice in like cases.

The rule of *Hill* v. *Gruell* has not been qualified and is reinforced by other Illinois decisions holding that Section 49 of the Chancery Act is not exclusive. *Eads* v. *Mason,* 16 Ill. App. 545, 547, 548; *Steere* v. *Hoagland,* 39 Ill. 264, 265–267; *McDowell* v. *Cochran,* 11 Ill. 31, 33; *Blair* v. *Illinois Steel Co.,* 159 Ill. 350, 358–360.[9] The rule is the same in other jurisdictions.[10]

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[9] It is the rule in Illinois that a statute giving a new right or a right equivalent to one already existing in equity does not bar the existing equitable right unless the statute contains language restrictive or prohibitory of the further continuance of the equitable right. *Ill. Life Ins. Co.* v. *Chicago*, 244 Ill. App. 185, 199, 200; *Hesse* v. *Voss*, 52 Ill. 472, 476, 477; *Labadie* v. *Hewitt*, 85 Ill. 341, 342, 343; *Wilson* v. *Illinois Trust and Savings Bank*, 166 Ill. 9, 13, 14; *McNab* v. *Heald*, 41 Ill. 326, 330–332; *Grimes* v. *Hilliary*, 38 Ill. App. 246, 247, 248. Cf. *Shippert* v. *Shippert*, 371 Ill. 267, 270, 271, and *Chapman* v. *American Surety Co.*, 261 Ill. 594, 602–606.

[10] *State and Watson, Trustee,* v. *Bank of Tennessee*, 64 Tenn. (5 Baxt.) 101, 107–114; *Lindemann* v. *Rusk*, 125 Wis. 210, 229–232; *State ex rel. Pabst* v. *Circuit Court*, 184 Wis. 301, 307; *Chatham* v. *Mecklenburg Realty Co.*, 180 N. C. 500, 502, 503; *Howe* v. *Robinson*, 20 Fla. 352, 355–357. The Cir-

The only statutory change of substance since the decision in *Hill* v. *Gruell* is the provision of a two-year period of limitation.[11] This is entirely irrelevant to the independent existence of the "trust fund" doctrine in Illinois. Indeed, by limiting the life of the statutory rights against the assets, officers and stockholders of a corporation dissolved without notice to creditors, it reinforced the need for equitable relief.

The statutes have no bearing on such a suit as was filed in the instant case. When Section 79 refers to the liabilities of officers and stockholders it would seem only to mean their statutory liabilities. Cf. *Consolidated Coal Co.* v. *Flynn Coal Co.*, 274 Ill. App. 405. Furthermore, the action here (like that in *Hill* v. *Gruell, supra*) is not one for

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cuit Court of Appeals apparently believed that it could not consider the above decisions. But, if *Hill* v. *Gruell* and the cases cited in the text and in note 9 be disregarded, and the Illinois courts considered silent on the question, the Federal court should decide it upon the basis of the general law. *Malloy* v. *New York Life Ins. Co.*, 103 F. (2d) 439, 445 (C. C. A. 1st), certiorari denied, 308 U. S. 572; *De Long* v. *Jefferson Standard Life Ins. Co.*, 109 F. (2d) 585, 586 (C. C. A. 5th), certiorari denied, 310 U. S. 635; *New York Life Ins. Co.* v. *Jackson*, 98 F. (2d) 950, 952 (C. C. A. 7th), certiorari denied, 305 U. S. 640. Certainly, the refusal of the court below to look beyond the Illinois decisions is hard to square with its almost exclusive reliance upon the decisions of this Court.

[11] Compare Section 3 of Act approved March 24, 1869 (Public Laws of Illinois, 1869, p. 1), Hurd's Ill. Rev. Stat. 1917, Ch. 32, Sec. 12, with Cahill's Ill. Rev. Stat. 1931, Ch. 32, Sec. 79, Ill. Rev. Stat. 1939, Ch. 32, Sec. 94, Par. 157.94.

personal judgment against the stockholders as such, but is against them and Duner for the purpose of recovering assets of the corporation. As was succinctly stated by the court, in *Hill* v. *Gruell, supra,* at p. 419:

> It [the bill] seeks to charge the defendants, not as stockholders, but as trustees, though that character was assumed by their action as stockholders.

To construe the statute otherwise would lead to the incongruous result that while suits against the officers and stockholders, as transferees, would be barred after two years, yet suits against other transferees would not be so barred.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

FRANCIS BIDDLE,
Solicitor General.

CLAUDE E. HAMILTON, JR.,
General Counsel, Reconstruction Finance Corporation.

MAY 1941.

APPENDIX

STATUTES DIRECTLY INVOLVED

An Act in relation to corporations for pecuniary profit, approved June 28, 1919, in force July 1, 1919 (Cahill's Ill. Rev. Stat. 1931, Ch. 32, Secs. 14, 53, 79):

> Sec. 14. "All corporations organized under the laws of this State, whose powers may have expired by limitation or otherwise, shall continue their corporate capacity for two years for the purpose only of collecting debts due such corporation and selling and conveying the property and effects thereof. Such corporations shall use their respective names for such purposes and shall be capable of prosecuting and defending all suits at law or in equity."
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> * * * * *
>
> SEC. 53. "After an adjudication of bankruptcy, or after an execution has been so returned, or has remained unsatisfied for more than ten days, after a demand made, or after dissolution or cessation of business leaving debts unpaid, any creditor may bring suit in equity, in any court having general jurisdiction in the county within which the principal office of the corporation is located on behalf of himself and of all other creditors of the corporation, against all persons who are liable in any way for the debts of the corporation, by joining the corporation in such suit. After exhausting the assets of such corporation, each stockholder may be required to pay his *pro rata*

share of such debts and liabilities to the extent of the unpaid portion of the stock and may, in addition thereto, be required to pay his *pro rata* share of not to exceed two weeks unpaid wages of all the employees of the corporation; * * *."

* * * * *

SEC. 79. "The dissolution, for any cause whatever, of any corporation, shall not take away or impair any remedy given against such corporations, its officers, or stockholders, for any liabilities incurred previous to its dissolution, if suit therefor is brought and service of process had within two years after such dissolution."

An Act to regulate the practice in courts of chancery, approved March 15, 1872, in force July 1, 1872 (Ill. Rev. Stat. 1939, Ch. 22, Sec. 49:

Sec. 49. "Whenever an execution shall have been issued against the property of a defendant, on a judgment at law or in equity, and shall have been returned unsatisfied, in whole or in part, the party suing out such execution may file a complaint against such defendant, and any other person, to compel the discovery of any property or thing in action, belonging to the defendant, and of any property, money, or thing in action due to him, or held in trust for him, and to prevent the transfer of any such property, money or thing in action, or the payment or delivery thereof to the defendant, except when such trust has, in good faith, been created by, or the fund so held in trust has proceeded from, some person other than the defendant himself. The court shall have power to compel such discovery, and to prevent such transfer, pay-

ment, or delivery, and to decree satisfaction of the sum remaining due on such judgments, out of any personal property, money, or things in action, belonging to the defendant, or held in trust for him, with the exception above stated, which shall be discovered by the proceedings in chancery, whether the same were originally liable to be taken in execution at law or not: Provided, that no answer made to any complaint filed under this and the preceding section shall be read in evidence against the defendant on the trial of any indictment for fraud charged in the complaint."

STATUTES INDIRECTLY INVOLVED

An Act to amend an act entitled "Abatements," approved March 1845, and to extend the time for closing up the affairs of corporations, approved and in force March 24, 1869 (Public Laws of Illinois, 1869, p. 1):

SECTION 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly, That all corporations created by special acts, or under general laws, and whose charters or act of incorporation may have expired for any reason whatever, shall continue their corporate capacity during the term of two years, for the sole purpose of collecting the debts due to said corporation, selling and conveying the property and estate thereof.

SEC. 2. The said companies shall use the name of their respective corporations for the purpose aforesaid, and shall be capable of prosecuting and defending all suits at law or in equity.

SEC. 3. The dissolution, for any cause whatever, of any company created as afore-

said, shall not take away or impair any remedy given against such corporation, its stockholders or officers, for any liabilities incurred previous to its dissolution.

An Act concerning corporations, approved April 18, 1872, in force July 1, 1872 (Hurd's Ill. Rev. Stat. 1917, Ch. 32, Secs. 10, 11, 12, 25):

SEC. 10. All corporations organized under this law whose powers may have expired by limitation or otherwise shall continue their corporate capacity during the term of two years, for the purpose only of collecting the debts due said corporations and selling and conveying the property and effects thereof.

SEC. 11. Such corporations shall use their respective names for the purposes aforesaid, and shall be capable of prosecuting and defending all suits in law or equity.

SEC. 12. The dissolution, for any cause whatever, of any corporation created as aforesaid, shall not take away or impair any remedy given against such corporation, its stockholders, or officers for any liabilities incurred previous to its dissolution.

* * * * *

SEC. 25. If any corporation or its authorized agents shall do, or refrain from doing any act which shall subject it to a forfeiture of its charter or corporate powers, or shall allow any execution or decree of any court of record, for a payment of money, after demand made by the officer, to be returned "No property found," or to remain unsatisfied for not less than ten days after such demand, or shall dissolve or cease doing business, leaving debts unpaid, suits in equity may be brought against all persons who were stockholders at the time, or liable in

any way, for the debts of the corporation, by joining the corporation in such suit; and each stockholder may be required to pay his pro rata share of such debts or liabilities to the extent of the unpaid portion of his stock, after exhausting the assets of such corporation. * * * [As amended by act approved May 22, 1877. In force July 1, 1877. L. 1877, p. 66; Legal News Ed., p. 72.][12]

An Act to revise the law relating to corporations for pecuniary profit, filed July 13, 1933 (Ill. Rev. Stat. 1939, Ch. 32, Secs. 86, 94, Par. 157.86, 157.94):

157.86. JURISDICTION OF COURT OF EQUITY TO LIQUIDATE ASSETS AND BUSINESS OF CORPORATION. Courts of equity shall have full power to liquidate the assets and business of a corporation:

* * * * *

(b) Upon the suit of a creditor whose claim has either been reduced to judgment and an execution thereon returned unsatisfied, or whose claim is admitted by the corporation, when in either case it is made to appear that the corporation is unable to pay its debts and obligations in the regular course of business as they mature.

* * * * *

157.94. SURVIVAL OF REMEDY AFTER DISSOLUTION. The dissolution of a corporation either (1) by the issuance of a certificate of dissolution by the Secretary of State, or (2) by the decree of a court of equity when the court has not liquidated the assets and business of the corporation, or (3) by expiration

[12] The amendment of May 22, 1877, did not change the above language.

of its period of duration, shall not take away or impair any remedy given against such corporation, its directors, or shareholders, for any liability incurred prior to such dissolution if suit thereon is brought and service of process had within two years after the date of such dissolution. Such suits may be prosecuted against and defended by the corporation in its corporate name.

Act approved March 3, 1845 (Rev. Stat. of Ill. 1845, Ch. XXI, Secs. 36, 37, p. 97):

SEC. 36. Whenever an execution shall have been issued against the property of a defendant, on a judgment at law or in equity, and shall have been returned unsatisfied, in whole or in part, the party suing out such execution may file a bill in chancery against such defendant, and any other person, to compel the discovery of any property, or thing in action, belonging to the defendant; and of any property, money, or thing in action due to him, or held in trust for him, and to prevent the transfer of any such property, money, or thing in action, or the payment or delivery thereof to the defendant, except when such trust has been created by, or the fund so held in trust has proceeded from, some person other than the defendant himself.

SEC. 37. The court shall have power to compel such discovery, and to prevent such transfer, payment, or delivery, and to decree satisfaction of the sum remaining due on such judgments, out of any personal property, money, or things in action, belonging to the defendant, or held in trust for him, with the exception above stated, which shall

be discovered by the proceedings in chancery, whether the same were originally liable to be taken in execution at law or not: *Provided,* That no answer made to any bill filed under this and the preceding section shall be read in evidence against the defendant on the trial of any indictment for the fraud charged in the bill.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 1084 1105

RECONSTRUCTION FINANCE CORPORATION,
Petitioner,

vs.

LUCIUS TETER, ET AL.,
Respondents.

BRIEF OF FLETCHER M. DURBIN, ANGUS S. HIBBARD, C. M. MODERWELL, AND JOHN A. McCORMICK, CERTAIN OF THE RESPONDENTS HEREIN, IN OPPOSITION TO THE PETITION OF RECONSTRUCTION FINANCE CORPORATION FOR A WRIT OF CERTIORARI.

LELAND K. NEEVES,
W. T. DURBIN,
HERBERT H. SCHEIER,
Counsel for the above named Respondents.

THE GUNTHORP-WARREN PRINTING COMPANY, 230 WEST JACKSON, CHICAGO

INDEX.

PAGE

Opinions Below 1

Statement as to Jurisdiction 1

Question Presented 2

Statutes Involved 5, 35

Statement of the Case 5

Summary of Argument 14

ARGUMENT.

I. THE TRUST FUND DOCTRINE HAS NO APPLICATION TO THIS CASE 19

A. The stockholders of C. T. C. Investment Company, including the individual defendants herein, have not received, nor have they appropriated to themselves, any of the assets of that company to the exclusion of creditors... 19

B. In any event the trust fund doctrine does not permit a direct suit by creditors against third party debtors of a corporation 19

II. SECTIONS 14, 17, AND 53 OF THE 1919 CORPORATION ACT PRECLUDE THIS ACTION. NOR WILL THIS ACTION LIE UNDER SECTION 49 OF THE CHANCERY ACT 26

III. THE COURT BELOW HAS PROPERLY FOLLOWED THE ILLINOIS DECISIONS AS TO THE APPLICABILITY OF THE ABOVE STATUTORY PROVISIONS TO THIS CASE.. 30

CASES CITED.

Clapp v. Peterson, 104 Ill. 26 21
Consolidated Coal Co. v. Flynn Coal Co., 274 Ill. App. 405 .....16, 17, 28, 30
Dukes v. Harrison & Reidy, et al., 270 Ill. App. 372.... 27
Erie R. R. Co. v. Thompkins, 304 U. S. 64.....17, 31
Fidelity Union Trust Co., et al. v. Field, ... U. S., ..., decided December 9, 1940..... 31
Fogg v. Blair, 133 U. S. 544..... 22
Furness, Withy & Co. v. Yang-Tsze Insurance Association, 242 U. S. 430..... 32
Gottlieb v. Miller, 154 Ill. 144..... 22
Hill v. Gruell, 42 Ill. 411.....8, 19, 23, 32
Hollins v. Brierfield Coal & Iron Co., 150 U. S. 371...21, 22
Johnson v. Canfield-Swigart Co., 292 Ill. 109..... 22
Klaxon Company v. Stentor Electric Mfg. Co., Inc., ... U. S. ....., decided June 2, 1941..... 31
Life Association of America v. Fasset, 102 Ill. 315... 25
Magnum Import Co. v. Coty, 262 U. S. 159..... 33
The Rockford Wholesale Grocery Company v. The Standard Grocery and Meat Company, 175 Ill. 89... 22
Sanger v. Upton, 91 U. S. 56..... 22
Sarelas v. McCue & Co., 291 Ill. App. 450..... 27
Sawyer v. Hoag, 17 Wall. 610..... 21
Singer & Talcott Co. v. Hutchinson, 187 Ill. 48..... 28
Smith v. Railroad Company, 99 U. S. 398.....15, 21
Standard Distilling Co. v. Coal Co., 239 Ill. 600, 605..25, 28
Stoner v. New York Life Ins. Co., ... U. S. ....., decided December 23, 1940 31

Union Mutual Life Insurance Co. v. Frear-Stone Mfg. Co., 97 Ill. 537 22

Wabash, St. Louis & Pacific Ry. Co. v. Ham, 114 U. S. 587 22

West, et al. v. American T. & T. Co., ... U. S. ....., decided December 9, 1940..... 31

Wood v. Dummer, 3 Mason 308, Fed. Cases No. 17,944. 21

STATUTES INVOLVED.

Sec. 14, 1919 Illinois Corporation Act.....5, 15, 26, 31, 35

Sec. 53, 1919 Illinois Corporation Act.....
.....5, 15, 16, 17, 21, 26, 28, 29, 31, 33, 35

Sec. 79, 1919 Illinois Corporation Act.....
.....5, 15, 16, 17, 21, 28, 29, 30, 33, 35

Sec. 49, Illinois Chancery Act.....5, 15, 16, 29, 36

Sec. 86, Illinois Business Corporation Act of 1933....29, 36

Sec. 94, Illinois Business Corporation Act of 1933.17, 29, 37

Sec. 8, 1872 Illinois Corporation Act..... 28

Sec. 10, 1872 Illinois Corporation Act.....16, 28

Sec. 11, 1872 Illinois Corporation Act..... 28

Sec. 12, 1872 Illinois Corporation Act.....15, 27, 28

Sec. 25, 1872 Illinois Corporation Act.....16, 28

Fletcher, Encyclopedia on Corporations..... 22

Cook on Corporations..... 22

No. 1084.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

RECONSTRUCTION FINANCE CORPORATION,
Petitioner,

vs.

LUCIUS TETER, ET AL.,
Respondents.

BRIEF OF FLETCHER M. DURBIN, ANGUS S. HIBBARD, C. M. MODERWELL, AND JOHN A. McCORMICK, CERTAIN OF THE RESPONDENTS HEREIN, IN OPPOSITION TO THE PETITION OF RECONSTRUCTION FINANCE CORPORATION FOR A WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

OPINIONS BELOW.

There is no written or printed opinion of the District Court. The opinion of the Circuit Court of Appeals is reported in 117 Fed. (2d) 716, and appears in the Record beginning at page 204.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on January 4, 1941 (R. 222). Petitioner's petition for rehearing was denied on February 26, 1941 (R. 223). The jurisdiction of this court is invoked under section 240(a) of Judicial Code as amended.

Question Presented.

In its petition herein (p. 2) under the heading "Question Presented" petitioner states that it brought this suit as a creditor

> "to recover against the assets of a dissolved corporation which had passed into the possession of a former officer for administration and liquidation."

This statement does not correctly indicate the nature of this proceeding. Nor does petitioner's further statement (Pet. p. 2) that the

> "principal question presented is whether under Illinois law a court of equity may administer those assets as a trust fund for the benefit of creditors or whether such relief, long recognized by Illinois decisions, is precluded or limited by the provisions of certain Illinois statutes which prescribe a procedure, during a specified period after dissolution, for rights against the corporation, its officers, and stockholders"

correctly state the question or questions at issue.

Contrary to petitioner's statement, the fact is that petitioner is seeking to maintain a suit directly upon the two indemnity agreements (Exhibits VII and VIII) against the signers thereof—the individual defendants herein other than Joseph Duner and Mrs. Requa, who is sued as Administratrix of the Estate of Charles H. Requa, who was one of the signers of said agreements—as if petitioner were an actual party to those agreements. Petitioner's contention that there is any question here as to the administration of the corporate assets as a trust fund for the benefit of corporate creditors is an afterthought advanced for the first time in the court below, and even then in a different form from that in its present petition.

No contention as to any "trust fund doctrine" was made in the trial court, nor is either the original or amended complaint framed upon any such theory.

In its opinion the court below states (R. 204):

> "This equitable action was brought against the C. T. C. Investment Company and its stockholders to recover upon two guaranties executed by that company, and to recover upon two agreements executed by certain of the individual defendants who were stockholders of that company."

The above statement was taken directly from petitioner's brief in the court below and reflects the contentions which it was then making in that court.

The "trust fund doctrine" contention was evolved by petitioner in the court below solely for the purpose of enabling it to sue directly upon the said two indemnity agreements, Exhibits VII and VIII—as an alternative ground in the event its contention was not sustained that it was a third party beneficiary of those agreements. Petitioner's contention was that under the trust fund doctrine it could sue directly the debtors of the corporation.

The court below stated in its opinion (R. 214-215):

> "Appellant contends, however, that it can recover on the guaranties of the C. T. C. Investment Company, exhibits 5 and 6, against that company's property in the hands of its stockholders, although the company was dissolved more than two years prior to the filing of this action, and that in so doing it can sue the debtors of the company directly on any choses in action constituting part of its assets. This contention is based on the proposition that its bill is not a mere creditor's bill and that the dissolved corporation is not a necessary party, which fact renders immaterial, so far as other parties defendant are concerned, the court's ruling on the motion to quash.
>
> "Appellant's argument in this respect is that in equity the assets of a dissolved corporation, including its choses in action, pass to its stockholders as tenants in common; that in equity the assets of a dissolved corporation passing to its stockholders constitute a trust fund which can be reached in their hands by the corporation's creditors for the purpose of satisfying

claims; *and that therefore appellant can sue directly on those assets including choses in action.*" (Italics ours.)

In its present petition petitioner carefully avoids any clearcut statement that it is endeavoring to bring a suit directly upon Exhibits VII and VIII, but on the contrary endeavors to give the impression that it is merely endeavoring to reach corporate assets in the hands of the stockholders which they have appropriated to themselves to the exclusion of creditors. In other words petitioner, in its present petition, is endeavoring to present this controversy as a simple and typical "trust fund doctrine" action.

In answer to petitioner's contention and line of argument in the Court below these respondents pointed out, first, that nothing in the trust fund doctrine gives a corporate creditor any right to sue third party debtors of the corporation directly upon their contracts with the corporation as if it were a party to those contracts, and, second, that in any event the individual defendants as stockholders of the C. T. C. Investment Company had not received or appropriated to themselves any of the corporate assets.

The receipt by stockholders, or the appropriation to themselves as stockholders, of corporate assets, leaving debts unpaid, lies at the very foundation of the trust fund doctrine. Unless the stockholders have in fact so received or appropriated to themselves such assets there is no foundation whatsoever for applying the doctrine.

The present petition cites no authority whatsoever in support of the proposition that the trust fund doctrine applies where the stockholders have not in fact appropriated to themselves the corporate assets to the exclusion of creditors, or that under the trust fund doctrine a corporate creditor can sue third party debtors of the corporation directly upon their contracts with the corporation as if it were a party thereto.

Subject to the patent uncertainties of the present petition, we think the questions presented are as follows:

1. Does the trust fund doctrine apply where the stockholders have not in fact received or appropriated to themselves any of the corporate assets?

2. Does the trust fund doctrine permit a suit by a corporate creditor against third party debtors of the corporation upon contracts between such debtors and the corporation as if such creditor were a party to such contracts?

3. Can this suit, which is essentially a creditor's bill, be maintained in the face of sections 14, 79, and 53 of the 1919 Illinois Corporation Act and section 49 of the Chancery Act?

4. Did the Court below fail to ascertain and apply the Illinois law?

This suit was brought by petitioner solely for its own benefit and without reference to any other possible creditor of the C. T. C. Investment Company.

Statutes Involved.

The statutes directly involved are sections 14, 53, and 79 of the 1919 Illinois Corporation Act and section 49 of the Illinois Chancery Act. These sections are set out in the appendix hereto.

Statement.

The original and amended complaints were dismissed by the trial court upon motions (R. 63-105; 169-192) by the individual defendants herein (R. 192). At the same time the purported service, together with return thereof, upon C. T. C. Investment Company was quashed (R. 193). The facts appear only from the allegations of the amended complaint and from the exhibits and affidavits filed in support of the motions filed on behalf of Teter, and others (R. 70-78, 89-97, 179-187).

The facts as stated in the amended complaint[1] were as follows:

In May, 1929 Chicago Trust Company and the National Bank of the Republic, two Chicago banks, consolidated (R. 110). Each bank was to contribute an agreed amount of assets to make up the capital of the new bank (R. 111). C. T. C. Investment Company was organized in connection with said consolidation (R. 114).

Upon examination of the assets of the two banks it was found that neither bank had acceptable assets in the required amounts (R. 113-114).

Thereupon the Otte-McCreight agreement was entered into (Exhibit IV), under which the unacceptable assets were to be withdrawn from the consolidated bank "at book value", excepting that by mutual agreement certain of the assets might be left in the consolidated bank providing they were guaranteed "for definite periods" by the C. T. C. Investment Company (R. 114; 147).

Pursuant to this arrangement the C. T. C. Investment Company entered into a guaranty agreement (Exhibit V, R. 148) covering specific items shown in Exhibit A thereto (R. 148). The guaranty ran to the consolidated bank (R. 149).

As of the same date C. T. C. Investment Company entered into a further guaranty agreement (Exhibit VI, R. 154) covering any additional loans, etc., made by the consolidated bank at the instance of the C. T. C. Investment Company, and also all new loans, etc., made by the consolidated bank, the proceeds of which were to be used to pay off any of the loans listed in Exhibit A of Exhibit V (R. 155).

1. The amended complaint (R. 110) was not materially different from the original complaint (R. 2). Paragraph 36 was amended to read as hereinafter stated *infra*, p. 8. A new paragraph 38 was included (R. 125). Paragraph 38 of the original complaint (R. 18) was amended by adding the words "of said agreements and as assignee" after the word "assignee" in the second line of the paragraph. The paragraph was also renumbered 39.

The amended complaint then alleged that prior to the completion of the consolidation it appeared that an underwriting agreement had been made with reference to some Cuban bonds, which agreement was apparently a liability of the Chicago Trust Company (R. 116-117); that thereupon the individual defendants herein, except Joseph Duner, entered into the first of the so-called indemnity agreements (Exhibit VII, R. 117, 156).

The amended complaint further alleged that thereafter the C. T. C. Securities Company took over the $800,000 note which was involved in the matter of the Cuban bonds (R. 119) and that thereupon the individual defendants who had executed Exhibit VII executed Exhibit VIII (R. 119-120, 159).

The purchase of the $800,000 note was made on or about August 23, 1929 (R. 119). Exhibit VIII was entered into on October 10, 1929 and purported to relate to "any present or future purchases," etc. (R. 159).

While in both of the courts below petitioner claimed that Exhibit VII was still in effect, it seems now in its present petition to have abandoned that position inasmuch as it now refers (pet. p. 4) only to "an agreement of indemnity" and the record reference—page 159—is to Exhibit VIII. On page 5 of its petition, reference is had to "the indemnity agreement referred to above."

Notwithstanding petitioner's statement that

> "the action here • • • is not one for personal judgment against the stockholders as such, but is against them and Duner for the purpose of recovering assets of the corporation,"

the amended complaint does in fact pray for a personal judgment against the individual defendants (R. 127). While petitioner's said statement is as to the individual defendants *as stockholders*, we do not understand that any distinction is being attempted between the stockholders of the C. T. C. Investment Company *as such* and said stockholders,

as *individuals,* inasmuch as petitioner refers in that connection to the *Gruell* case as also not seeking a personal recovery against the stockholders there involved. This statement is contrary to the fact because in the *Gruell* case the creditor not only sought but actually recovered a personal decree against the stockholders for the amount of his claim.

The individual defendants are sued as *individuals,* as well as stockholders. See the following quotation of Par. 36 of the Amended Complaint.

The C. T. C. Investment Company was dissolved by decree of the Superior Court of Cook County on May 20, 1933. Paragraph 36 of the amended complaint (R. 125) alleges that at the time of the dissolution of the C. T. C. Investment Company on May 20, 1933

> "Said company was possessed of assets consisting for the most part of notes, bonds and securities, *all of said assets being the remainder of the identical assets, or proceeds thereof, delivered to the C. T. C. Investment Company on June* 29, 1939, *as surplus assets of the Chicago Trust Company;* that such remaining assets are now being administered in the name of C. T. C. Investment Company by Joseph Duner, one of the former officers of said company, under some arrangement or agreement, the terms of which are unknown to plaintiff; that such assets, though substantial, are not sufficient to pay in full the liability of C. T. C. Investment Company upon its guaranties referred to herein as Exhibits V and VI hereof; that all stockholders of the C. T. C. Investment Company have a common interest in the subject matter of this suit; that the individual defendants named herein are stockholders of the C. T. C. Investment Company, and are sued herein as individuals and as stockholders of the C. T. C. Investment Company on behalf of all stockholders thereof." (Italics ours.)

The portion appearing in the above in italics was not a part of paragraph 36 of the Complaint as originally filed

(R. 18). The amendatory matter makes it clear that the assets referred to in paragraph 36 did not include the two indemnity agreements, Exhibits VII and VIII, inasmuch as those indemnity agreements were not at any time "surplus assets" of the Chicago Trust Company and had not at any time been delivered over to the C. T. C. Investment Company by the Chicago Trust Company.

Subsequently the consolidated bank, through the instrumentality of the Chicago Trust Company, the corporate identity of which had been retained in the consolidation, merged with the Central Trust Company, the new bank becoming Central Republic Bank and Trust Company. (Amended Complaint, paragraphs 25, 26; R. 120-121.)

The amended complaint states (Par. 25 thereof, R. 120-121) that all of the assets of the old consolidated bank were transferred to Chicago Trust Company, and that included in said assets were the loans listed in Exhibit A to Exhibit V and all the new loans, etc., the proceeds of which were used to pay off the loans so listed in Exhibit A to Exhibit V, together with the guaranty agreements Exhibits V and VI and the indemnity agreements Exhibits VII and VIII; that by virtue of the merger with the Central Trust Company said loans and said guaranty and indemnity agreements became vested in the Central Republic Bank and Trust Company (R. 121), and that the last named company thereupon by Exhibit X (R. 164) transferred to petitioner all of said loans and guaranties (R. 123).

Neither the original nor the amended complaint alleges in any way that petitioner's claims, whatever they might be, against C. T. C. Investment Company because of that company's said guaranty agreements (Exhibits V and VI) have ever been adjudicated or reduced to judgment.

Petitioner's right to enforce said guaranties was challenged in both of the courts below. Exhibit V was a specific guaranty to the consolidated bank (R. 149) notwith-

standing the further provision that the guaranty should inure to the benefit of the successors and assigns of the consolidated bank (R. 149). Said last provision, however, does not of itself mean that the guaranty itself runs to the successors and assigns of the consolidated bank. Exhibit VI was also evidently intended as a specific guaranty to the consolidated bank (R. 155), also with the provision that the guaranty should inure to the benefit of the successors and assigns of that bank. It does not follow as a legal proposition that the transfer of the loans specified in Exhibit V, in Exhibit A thereto, carried with it the guaranty itself. Exhibit X (R. 164), executed by Central Republic Bank and Trust Company in June 1932 as part of the so-called Dawes Loan, purported to assign to petitioner all of assignor's assets other than those comprised in the designation "Total Cash Means." The complaint merely alleges that such item "Total Cash Means" did not include any of the notes or guaranties described in the complaint (R. 123).

In June 1934 the said last named bank (its name having theretofore been changed to Central Republic Trust Company (R. 124)) executed Exhibit XI whereby the first guaranty agreement of the C. T. C. Investment Company was assigned to petitioner (R. 165).

Subsequently in June 1939 on the very eve of this suit the receiver of Central Republic Trust Company executed an assignment to petitioner of the two indemnity agreements (Exhibits VII and VIII) signed by the individual defendants (Exhibit XII, R. 167). The complaint does not show that the Receiver had any title to said agreements or any right to assign them.

C. T. C. Investment Company was dissolved by decree of the Superior Court of Cook County in May 1933 (R. 125).

The present suit was brought in June 1939, more than

six years after the C. T. C. Investment Company was dissolved.

Neither the original nor amended complaint alleges in any way that any of the stockholders of C. T. C. Investment Company, including the signers of Exhibits VII and VIII ever received or ever had in their possession at any time any of the assets which belonged to the C. T. C. Investment Company at the time of its dissolution. The amended complaint asserts a right in petitioner as a creditor of C. T. C. Investment Company to a personal judgment in its own favor upon the two indemnity agreements (Exhibits VII and VIII) against the signers thereof (R. 127).

The judgment of the District Court sustaining the motions to quash the purported service of summons upon the C. T. C. Investment Company, and the return upon such service, and to dismiss the complaint as to the individual defendants was affirmed by the court below (R. 192; 222).

In its brief filed in the District Court, petitioner characterized the nature of this proceeding as follows:

> "Plaintiff brings suit upon the following theories:
>
> "(a) That the contracts signed by Charles H. Requa and the other individual defendants except Joseph Duner, Exhibits VII and VIII of the complaint, are contracts made for the direct benefit of the National Bank of the Republic of Chicago, its successors and assigns, and enforcible by them, and
>
> "(b) That Exhibit IV of the complaint, the Otte-McCreight proposition, created a trust of the surplus assets of Chicago Trust Company for the purpose of making good certain questioned loans of Chicago Trust Company accepted by the National Bank of the Republic of Chicago, which surplus assets are now in the hands of the defendant Joseph Duner."

And further:

> "That portion of the Bill of Complaint which seeks to enforce the trust is an action *in rem* against the

property alleged to be in the hands of Joseph Duner. Because of the fact that that property was nominally owned by the C. T. C. Investment Company, a corporation, the stockholders of that corporation have an interest in that property. For that purpose the stockholders, as a class, have been named defendants but that does not make the bill a stockholders' suit within the meaning of Rule 23-B of the Federal Rules of Civil Procedure. The plaintiff does not claim to be or ever to have been a stockholder of the C. T. C. Investment Company.

"The defendants in their motions to dismiss have erroneously concluded that the Bill of Complaint is a creditors' bill seeking some affirmative relief against the C. T. C. Investment Company, and that because of the dissolution of the C. T. C. Investment Company the bill must fail. The Bill of Complaint is not a creditors' bill. The C. T. C. Investment Company is named as a defendant in the bill only for the purpose of barring such right as it may have in assets alleged by the Bill of Complaint to be held by Joseph Duner and to be impressed with the lien of a trust created under Exhibit IV to the complaint. No other relief is sought against the C. T. C. Investment Company."

In a supplemental brief in the District Court, petitioner stated:

"As pointed out in the plaintiff's original brief no relief is prayed against the C. T. C. Investment Company excepting the barring of whatever rights it may have in assets which the bill seeks to have declared to be trust funds, and of which the bill of complaint says the C. T. C. Investment Company was trustee."

In the court below petitioner abandoned its claim that the Otte-McCreight agreement (Exhibit IV, R. 147) created an express trust in the surplus assets of the Chicago Trust Company. In lieu thereof, and, as we have said, apparently for the purpose of finding alternative support for its claim that it could directly sue upon Exhibits VII and VIII in case its "third party beneficiary" theory were

overruled, petitioner for the first time made its so-called "trust fund doctrine" contention, urging in that regard, as we have pointed out, that under that doctrine petitioner as creditor could sue directly the debtors of the C. T. C. Investment Company. See excerpt from the opinion below, *supra*, pp. 3-4.

Petitioner, on page 5 of its petition, states that it brought this suit to recover upon the guaranties of the C. T. C. Investment Company of the notes, etc., pledged by Central Republic Bank and Trust Company, and that among the defendants named were the C. T. C. Investment Company and Joseph Duner

> "and the individuals who executed the indemnity agreement referred to above."

We are constrained to say that the foregoing statement is lacking in candor and frankness both as to the nature of the proceeding and as to the status of the individual defendants in this case.

Aside from the allegations in paragraph 36 of the amended complaint which, with considerable ambiguity, was apparently intended as a means merely of foreclosing any right that the C. T. C. Investment Company or its stockholders might have in the surplus assets of Chicago Trust Company there mentioned,[1] petitioner's effort here is to assert a right to sue the signers of Exhibits VII and VIII upon those contracts as if it were a party thereto. So far as those contracts are concerned petitioner in its present petition is seemingly at least trying to avoid a disclosure to this court as to the real nature of this proceeding.

---

1. In the light of petitioner's statements in its briefs in the District Court these respondents offered to disclaim any interest that they might have in such assets. At that time, however, petitioner was asserting a right to bring suit on Exhibits VII and VIII as third party beneficiary thereof.

SUMMARY OF ARGUMENT.

I.

The trust fund doctrine has no application to this case. The stockholders of C. T. C. Investment Company, including the individual defendants herein, have not received nor have they appropriated to themselves any of the assets of that company to the exclusion of its creditors. The complaint herein alleged in paragraph 36 that at the time of the dissolution of C. T. C. Investment Company it had in its possession certain surplus assets which had been turned over to it by Chicago Trust Company, one of the constituent banks in the consolidation, that such assets were at the time of the filing of the complaint being administered in the name of C. T. C. Investment Company by Joseph Duner, one of the former officers of the company, under some arrangement, the terms of which were unknown to petitioner, that such assets, though substantial, were not sufficient to pay in full the liability of C. T. C. Investment Company upon its guaranty agreements, Exhibits V and VI, that all stockholders of the C. T. C. Investment Company had a common interest in the subject matter of the suit, and that the individual defendants named herein were stockholders of C. T. C. Investment Company and were sued as individuals and as stockholders of the C. T. C. Investment Company on behalf of all the stockholders thereof.

The trust fund doctrine presupposes that corporate assets have been appropriated to themselves by the stockholders to the exclusion of creditors. The trust fund doctrine in its simplest form simply means that corporate property must first be appropriated to the debts of the company before any portion of it can be distributed to the stockholders. This court has so held. Such is also the law in Illinois.

Nothing in the trust fund doctrine permits a corporate creditor upon dissolution to sue third party debtors of the corporation directly upon their contracts with the corporation as if such creditor were a party to such contracts. The appropriate remedy is a creditors' bill. The fact that the individual defendants herein other than Joseph Duner had entered into the indemnity agreements, Exhibits VII and VIII, with C. T. C. Investment Company is no reason for permitting petitioner to sue said defendants upon those agreements as if it were a party thereto. Although petitioner may be a creditor of C. T. C. Investment Company it has not reduced its claim against that company to judgment, and it has no lien of any kind upon the assets of C. T. C. Investment Company. Petitioner's case as against the signers of Exhibits VII and VIII is therefore nothing but a common creditors' bill. Cf. *Smith* v. *Railroad Company*, 99 U. S. 398; Opinion below. (R. 215.)

The signers of Exhibits VII and VIII, although also stockholders of C. T. C. Investment Company, did not come into possession of any of the C. T. C. Investment Company assets upon the dissolution of that company merely because they were stockholders of that company, or merely because they were under contract obligation to it. Nothing in the trust fund doctrine furnishes any support for the contention that the signers of Exhibits VII and VIII, as stockholders of the C. T. C. Investment Company, came into possession of their own contract obligations. Nothing in the trust fund doctrine permits a corporate creditor to bring a direct suit against third party debtors of the corporation.

II.

Sections 14, 79, and 53 of the 1919 Corporation Act preclude this action. Nor will this action lie under section 49 of the Chancery Act. Section 12 of the 1872 Corporation

Act preserved as against dissolution rights and remedies of corporate creditors against the corporation, its directors and stockholders for any liability incurred prior to such dissolution. Under that section the Illinois courts held that suits *against* the corporation were subject only to the general statute of limitations, and that the 2-year limitation period in section 10 of the Act did not apply. When the 1919 Act was passed section 12 of the earlier Act was carried forward as section 79 of the new Act, with the further express provision that such suits and remedies were not barred by dissolution provided suit is brought and service of process had within two years from the time of dissolution.

Section 79 does not of itself create any remedies, but simply preserves remedies otherwise available and existing. Section 53 of the 1919 Act which carried forward the first portion of section 25 of the 1872 Act is not limited to the enforcement of unpaid stock liability or other statutory liability, but applies to cases where stockholders have made themselves liable in equity for corporate debts by reason of having appropriated to themselves the corporate assets. Section 53 expressly requires that the corporation be made a party defendant. Under these various provisions of the 1919 Act the Illinois Appellate Court has held in a series of cases that suits may not be brought against the stockholders after two years from the time of dissolution. These holdings were based upon the ground that the 2-year limitation period in section 79 was not a mere statute of limitations, but was an integral part of the cause of action itself. In one of these cases, *Consolidated Coal Co.* v. *Flynn Coal Co.*, 274 Ill. App. 405, the claim was made not only for unpaid stock liability but for liability under the trust fund doctrine. The court nevertheless held that the action could not be maintained.

Section 49 of the Chancery Act requires a judgment and return of execution as a condition to the suit.

The court below properly gave effect to the Illinois law as evidenced by the Appellate Court decisions in question, as it was required to do under the rule of *Erie R. R. Co.* v. *Tompkins,* 304 U. S. 64.

None of the cases relied upon by petitioner involve any construction or application of section 79 of the 1919 Act in conjunction with section 53 thereof.

The 1933 Corporation Act carried forward into section 94 thereof the provisions of section 79 of the 1919 Act. The omission in the 1933 Act of section 53 of the 1919 Act is immaterial. The rights of the litigants herein are governed by the 1919 Act under which C. T. C. Investment Company was organized and dissolved. The 1933 Act provides a completely different scheme for the dissolution of corporations and can have no controlling effect upon the dissolution of a corporation occurring prior to the time the Act was passed.

III.

The court below properly followed the Illinois decisions as to the applicability of the Illinois statute. Petitioner's statement that the failure of the court below to ascertain and apply the law of Illinois warrants review by this court has no support whatsoever. The court below did ascertain and apply the law of Illinois to this case.

The second ground urged, which is in effect that the court below misinterpreted and misapplied the Illinois law, is inconsistent with the first ground claimed.

If there were any ground whatsoever for the first claimed reason for the granting of the writ the only action of this court would be to send the case back to the court below for the purpose of deciding it in accordance with the Illinois law. But in that event it is obvious that the conclusion of the court below would be the same and its opinion would undoubtedly be the same.

Petitioner's real complaint here is that the decisions of the Appellate Court in question construe the statute in a manner different from that contended for by petitioner.

There is no adequate ground for the granting of the writ of certiorari herein. The writ is not intended merely to provide an additional hearing to a litigant who is defeated in the court below—even though it happens to be a Governmental agency. In the absence of any supporting brief by petitioner it is almost impossible to ascertain what its legal theory is as to why it has a right to sue the signers of Exhibits VII and VIII upon those contracts as if it were a party thereto. Petitioner has shifted its position throughout this case. The "trust fund doctrine" contention was not presented at all in the District Court, and neither the original nor the amended complaint is framed upon any such doctrine. Its chief reliance in both of the courts below was that it was a "third party beneficiary" of Exhibits VII and VIII. That claim was overruled by both courts and is now abandoned by petitioner in this court. Its "trust fund doctrine" contention was made for the first time in the court below where the argument was that legal title to corporate assets vested in the stockholders upon dissolution, that corporate assets are a "trust fund" for the payment of corporate debts and that *therefore* a corporate creditor, upon dissolution, may sue third party debtors of the corporation directly upon their contracts. The contention in that form also seems now to have been abandoned by petitioner. Its present petition is framed upon a materially different theory which is wholly without support in fact. The present petition does not disclose the real nature of this proceeding. It reads as if this were merely a proceeding to reach corporate assets which the stockholders have appropriated to themselves in fraud of creditors. No such case is presented by the complaint, nor was any such case argued or presented to the court below.

ARGUMENT.

I.

THE TRUST FUND DOCTRINE HAS NO APPLICATION TO THIS CASE.

A. THE STOCKHOLDERS OF C.T.C. INVESTMENT COMPANY, INCLUDING THE INDIVIDUAL DEFENDANTS HEREIN, HAVE NOT RECEIVED, NOR HAVE THEY APPROPRIATED TO THEMSELVES, ANY OF THE ASSETS OF THAT COMPANY TO THE EXCLUSION OF CREDITORS.

B. IN ANY EVENT THE TRUST FUND DOCTRINE DOES NOT PERMIT A DIRECT SUIT BY CREDITORS AGAINST THIRD PARTY DEBTORS OF A CORPORATION.

In its petition herein (p. 12) petitioner, paraphrasing the case of *Hill* v. *Gruell*, 42 Ill. App. 411, says in effect that the present complaint seeks to charge the individual defendants as trustees. We ask, trustees of what? They have none of the property or assets of the C. T. C. Investment Company and never had any of such property or assets. That the individual defendants were the signers of Exhibits VII and VIII and therefore might have been or were under some species of contract obligation to the C. T. C. Investment Company obviously does not constitute them trustees of the property and assets of that company, or of their own contract obligation.

Nothing that petitioner says or fails to say in its petition herein can change the fact that this suit is plainly an effort on petitioner's part to maintain an action upon Exhibits VII and VIII and to enforce those contracts as contracts against the signers thereof precisely as if the petitioner were a party thereto.

In urging its "trust fund doctrine" contention, in one form or another, petitioner seems to treat this case as if

the signers of Exhibits VII and VIII had actually paid into the C. T. C. Investment Company the respective amounts for which they were obligated under those two agreements, and as if the C. T. C. Investment Company had thereupon repaid those amounts back to the individual defendants.

Petitioner's whole contention seems to be based upon this *imaginary and non-existent* payment of $800,000 to the C. T. C. Investment Company by the signers of Exhibits VII and VIII and the *imaginary and non-existent* distribution or repayment of that sum of money back to them. But it otherwise sufficiently appears in this record that there are stockholders of C. T. C. Investment Company other than the signers of Exhibits VII and VIII, so that if the dissolution of that company and, as petitioner argued, the automatic vesting of *legal title* in the stockholders at large of that company upon such dissolution, renders the trust fund doctrine applicable, then it would necessarily follow that the whole body of stockholders would have to be charged with the aggregate obligation of $800,000 under Exhibits VII and VIII, and the individual defendants would be charged not for the amounts of their respective commitments under Exhibits VII and VIII, as petitioner here seeks but merely for their pro rata share *as stockholders* of such aggregate amount.

But this argument reduces the case to an absurdity. These other stockholders would thus be charged with their proportionate parts of the sum of $800,000 which C. T. C. Investment Company, the corporation, never received and never possessed, much less distributed or paid over to the stockholders.

The court below said in its opinion (R. 215):

> "Whether or not the complaint in this action amounts to a mere creditors' bill, it is worthy of note that but for the lack of an allegation of a judgment and an unsatisfied execution the bill and its prayer have all the necessary averments of a creditors' bill."

And in that connection the court quoted from the decision of this court in *Smith* v. *Railroad Company*, 99 U. S. 398, wherein it was said:

> "The relationship of the complainant to the company is that he is its creditor while the county is assumed to be, and perhaps is, its debtor. The complainant has no lien upon the fund he is seeking to reach. His case is, therefore, a common creditor's bill—nothing more and nothing less."

The individual defendants have contended throughout that notwithstanding petitioner's protestations to the contrary the action here sought to be maintained by petitioner so far as the signers of Exhibits VII and VIII were concerned was essentially a creditor's suit and that such action could not be maintained in the face of the Illinois statute which requires in such case that the corporation be made a party defendant (Sec. 53, 1919 Illinois Corporation Act) and that the action must be brought and service had within two years from the time of dissolution (Sec. 79, 1919 Illinois Corporation Act).

Petitioner complains that the court below cited and quoted at length from *Hollins* v. *Brierfield Coal & Iron Co.*, 150 U. S. 371, and it seems to contend that the Illinois courts have a different conception of the trust fund doctrine than does this court. Furthermore petitioner makes the most remarkable statement in its petition, commencing at the bottom of page 5, that the court below thought that the *Hollins* and *Smith* cases

> "so modified the trust fund doctrine that it could no longer be used to preserve the rights of creditors."

If the literalness of Mr. Justice Story's remarks in *Wood* v. *Dummer*, 3 Mason 308, Fed. Cases No. 17,944, has been modified or limited it was done by this court and not by the court below. Undoubtedly at times Judge Story's remarks were received with almost complete literalness of meaning. (*Clapp* v. *Peterson*, 104 Ill. 26; *Sawyer* v. *Hoag*,

17 Wall. 610; *Sanger* v. *Upton*, 91 U. S. 56.) Nevertheless just as this court was finally compelled to limit his pronouncements (*Wabash, St. Louis & Pacific Ry. Co.* v. *Ham*, 114 U. S. 587; *Fogg* v. *Blair*, 133 U. S. 544; *Hollins* v. *Brierfield Coal & Iron Co.*, 150 U. S. 371) so the Illinois court did likewise. (*The Rockford Wholesale Grocery Company* v. *The Standard Grocery and Meat Company*, 175 Ill. 89.)[1]

In point of fact the Illinois law on the trust fund doctrine does not differ materially from the law as announced by this court, and the short excerpt quoted below from *Fogg* v. *Blair* makes it obvious that the trust fund doctrine furnishes no support for an action brought by a corporate creditor directly against third party debtors of the corporation. The appropriate remedy there is a creditor's bill, or a bill in the nature thereof.

Furthermore, petitioner, as does the court below, refers to *Gottlieb* v. *Miller*, 154 Ill. 144, and *Johnson* v. *Canfield-Swigart Co.*, 292 Ill. 109, as recognizing the doctrine in this state—even though we can not determine from the petition with any certainty whether those cases are being criticized by petitioner or not.

For a complete discussion of the trust fund doctrine with its various ramifications we refer the court to Fletcher, Encyclopedia on Corporations, sections 7379 *et seq.*, and especially sections 7374, 7375, 7376, 7381 and 7384. See also Cook on Corporations, 8th Ed., Vol. 1, p. 49.

In *Union Mutual Life Insurance Co.* v. *Frear-Stone Mfg. Co.*, 97 Ill. 537, it was said (p. 547):

> "The capital stock of a corporation by most recent decisions is a trust fund that the directors may not

1. In the case last mentioned, the Illinois court quoted the following excerpt from *Fogg* v. *Blair*, 133 U. S. 544:

> "That doctrine [the trust fund doctrine] only means that the property must first be appropriated to the debts of the company before any portion of it can be distributed to the stockholders."

give away or misappropriate to the prejudice of the parties whom they have invited to deal with the corporation."

Have the individual defendants who were stockholders of the Investment Company and signers of Exhibit VIII come into possession of their own obligations under that contract, or have they taken over to themselves or misappropriated any of the corporate property or assets? It would seem unnecessary to have to argue that the signers of Exhibit VIII, whether they were stockholders of the Investment Company or not, have not come into possession of their own obligations in the sense of making applicable the trust fund doctrine. The only other assets of the Investment Company referred to in the complaint are the so-called surplus assets, or what remains thereof, which were transferred to the Investment Company by the Chicago Trust Company in June, 1929 (Amended Complaint, par. 36, R. 125). But the allegation there is that those assets are in the possession of Joseph Duner for purposes of administration. Possession in Joseph Duner for those purposes necessarily excludes any possession of those assets by the individual defendants herein or by the stockholders, at large, of C. T. C. Investment Company for their own purposes, and necessarily excludes any idea that the stockholders of C. T. C. Investment Company have appropriated any of such assets to themselves at the expense of corporate creditors.

In *Hill* v. *Gruell*, 42 Ill. App. 411, which seems to be petitioner's chief reliance, and which was decided long prior to the adoption of section 79 of the 1919 Illinois Corporation Act, Gruell had made a contract with the Eagle Packet Company, an Illinois corporation, whereby Gruell turned over to the company certain property as collateral security for the payment of a promissory note. The company was to dispose of the property and after paying certain charges was to pay the note and return any

excess to Gruell. The property was so sold by the company, leaving an excess belonging to Gruell—all of the proceeds being turned over to the company's treasurer. Thereupon the stockholders caused a Missouri company to be organized, of the same name, and caused all of the property and assets of the Illinois company to be transferred to the Missouri company. The stockholders of the Illinois company became stockholders of the Missouri company in the same relative proportions, although the number of shares and the par value thereof was decreased. Gruell sued the Illinois company and obtained a judgment against it for some fourteen hundred dollars ($1400.00), upon which judgment execution was issued and returned *nulla bona*. Thereupon Gruell filed a bill against the Missouri Company and against the stockholders thereof for the collection of the said judgment. Upon final hearing the court rendered a personal decree against the stockholders for the amount of Gruell's judgment, with interest thereon and costs. No decree went directly against the corporation. The court said that the transfer of the assets to the Missouri company and the receipt by the stockholders of the stock thereof

> "in purpose and direct effect was a dividend and distribution of these assets by the company to its own stockholders *pro rata*, the constituents of the two companies being precisely the same; and of this dividend each of the appellants received more than was sufficient to pay the claim of appellee. This claim arose before the attempted dissolution. It therefore could have no effect to prejudice any right of the creditor. [Citing section 12 of the Illinois Corporation Act.] They knew the company then had no means with which to make payment, having themselves, with others, appropriated its assets. They therefore became liable jointly and severally as trustees to pay it since each had received of the assets enough for that purpose; and their failure to pay it was a breach of that trust, whether fraudulent in fact or not."

The court there treated the matter as the distribution, by way of dividends, of all of the corporate assets, leaving Gruell's judgment and claim unpaid, and an appropriation by the stockholders to themselves of the corporate assets, leaving corporate debts unpaid. The situation there was not in any degree comparable to that in the instant case, nor is that case any support for petitioner's contention that it can sue third party debtors of the corporation upon contracts to which it is not a party. That corporate stockholders, by appropriating to themselves the corporate assets, leaving corporate debts unpaid, make themselves liable in equity for the amount of those debts to the extent of the assets received, was expressly held in *Standard Distilling Co.* v. *Coal Co.*, 239 Ill. 600, 605. In that case the action was brought under section 25 of the 1872 Act, and the Illinois court said that while section 25 was intended to provide a convenient remedy to enforce the liability of the stockholders as such, nevertheless the section also applied where stockholders had made themselves liable in equity for the corporate indebtedness by reason of having appropriated to themselves the corporate assets.

In other words, the last case above supports the proposition that an action founded upon the trust fund doctrine is subject to section 53 of the 1919 Act—the equivalent section so far as material here, to section 25 of the 1872 Act—and necessarily to other statutory regulation or restriction. In fact the clear import of the opinion in *Life Association of America* v. *Fasset*, 102 Ill. 315, is that the rights and liabilities of corporate creditors and stockholders are subject to legislative control (pp. 323-4).

If petitioner were consistent in its contentions, it would be contending in this proceeding that the individual defendants herein, who were stockholders of C. T. C. Investment Company, were liable—at least in equity—for the debts and obligations of that company upon its two guaranty agreements (Exhibits V and VI)—provided that it

was shown that said defendants in fact received any part of the corporate assets. The Complaint, however, makes no such case as against these defendants.

It will be further noted that in *Hill* v. *Gruell* the court cited section 12 of the 1872 Act, saying that the dissolution of the Packet Company "could have no effect to prejudice any right of the creditor." Is there any reason to suppose that had section 12 contained the 2-year limitation period, which was added to that section when the 1919 Act was adopted (section 79), the Appellate Court would have given no recognition to such restrictive provision?

It does not seem to us that upon any fair reading of the *Gruell* case it would be supposed that the court had any thought that actions of the kind there involved were not subject to the regulatory provisions or restrictions of the statute.

II.

SECTIONS 14, 79, AND 53 OF THE 1919 CORPORATION ACT PRECLUDE THIS ACTION. NOR WILL THIS ACTION LIE UNDER SECTION 49 OF THE CHANCERY ACT.

Section 14 of the 1919 Corporation Act continues the corporate existence of dissolved corporations for a period of two years for purposes of liquidation, etc. Section 79 of the Act preserves as against dissolution

> "any remedy given against such corporation, its officers or stockholders, for any liabilities incurred previously to its dissolution if suit is brought therefor and service of process had within two years after such dissolution."

Section 53 of the Act provides that in the event of dissolution or cessation of business leaving debts unpaid

> "any creditor may bring suit in equity * * * on behalf of himself and all other creditors of the corporation against all persons who are liable in any way for the debts of the corporation by joining the corporation in such suit. * * *"

In three cases the Illinois Appellate Court has construed these sections as barring actions against dissolved corporations or their stockholders after two years from the time of its dissolution. *Dukes* v. *Harrison & Reidy, et al.*, 270 Ill. App. 372; *Consolidated Coal Co.* v. *Flynn Coal Co.*, 274 Ill. App. 405; *Sarelas* v. *McCue & Co.*, 291 Ill. App. 450.

In *Consolidated Coal Co.* v. *Flynn Coal Co., supra,* the bill of complaint, in addition to claiming an unpaid stock liability on the part of the stockholders also asserted a claim against the stockholders of the transferring corporation because of the fact that they had taken over the corporate assets leaving the corporate debts unpaid. That the court below recognized that such claim was made and that reliance was being had upon the trust fund doctrine, clearly appears from the fact that the court discussed the doctrine at some length in its opinion, saying:

> "There is no dispute that by the common law doctrine of the status of a corporation after its dissolution for any cause, the corporation has no legal existence, and the real estate held by the dissolved corporation reverts to the grantors or donors, and the personal property escheats to the kind, and that no right of action can be maintained to enforce a claim against a defunct corporation. In the United States, however, this common law doctrine has been so modified that the property of a dissolved corporation is to be used for the benefit of the creditors and stockholders after dissolution, and generally, by a saving clause, stockholders or creditors may maintain an action for that purpose, and in order to maintain an action it must be filed within the time fixed for such purpose, in the instant case, by the saving clause, complainant was granted statutory right to maintain an action of the character before this court."

Section 12 of the 1872 Corporation Act did not contain the two-year limitation period and the Illinois courts had held under that Section that suits against a dissolved cor-

poration were subject only to the general statute of limitations (*Singer & Talcott Co.* v. *Hutchinson*, 176 Ill. 48). We can conceive of no clearer expression of legislative intent than the deliberate addition, when the 1919 Act came to be passed, of the two-year limitation period.

The 1872 Corporation Act provided in section 8 thereof for stockholder liability for the unpaid portion of their stock, and in the event of assignment that both assignor and assignee would be liable. Section 25 of that Act provided, among other things, that if a corporation should dissolve or cease doing business, leaving debts unpaid, suits in equity might be brought

> "against all persons who were stockholders at the time or liable in any way for the debts of the corporation by joining the corporation in such suit."[1]

Section 10 of the 1872 Act provided that corporations whose powers had expired by limitation or otherwise

> "shall continue their corporate capacity during the term of two years for the purpose only of collecting the debts due said corporation and selling and conveying the property and effects thereof."

Section 11 of said Act provided that such corporations

> "shall use their respective names for the purposes aforesaid, and shall be capable of prosecuting and defending all suits in law or equity."

Section 12 of said Act provided that the

> "dissolution for any cause whatsoever of any corporation created as aforesaid shall not take away or impair any remedy given against such corporation, its stockholders or officers, for any liabilities incurred previous to its dissolution."

Section 14 of the 1919 Illinois Corporation Act combined sections 10 and 11 of the 1872 Act. Section 79 of the 1919 Act was the same as section 12 of the 1872 Act,

1. As stated, it was held in *Standard Distilling Co.* v. *Coal Co.*, 239 Ill. 600, 605, that section 25 was not limited to the enforcement of unpaid stock liability.

except that it added the requirement as to the bringing of suits and the service of proof within two years from the time of dissolution.

Section 53 of the 1919 Act carried forward the first half of section 25 of the 1872 Act with some changes in wording. Section 53 provided, among other things, that after dissolution or cessation of business, leaving debts unpaid, any creditor might bring suit in equity on behalf of himself and all other creditors of the corporation

> "against all persons who are liable in any way for the debts of the corporation by joining the corporation in such suit."

Section 49 of the Chancery Act provides that whenever an execution shall have been issued against the property of a defendant on a judgment at law or in equity and shall have been returned unsatisfied in whole or in part, the party suing out such execution may file a complaint against such defendant and any other person to compel the discovery of any property or thing in action belonging to the defendant, etc., and that the court shall have power "to decree satisfaction of the sum remaining due on such judgments out of any personal property, money or things in action belonging to the defendant, or held in trust for him * * * whether the same were originally liable to be taken in execution at law or not * * *".

In its present petition petitioner seems also to have abandoned its claim that the provisions of the 1919 Act do not apply and that its right to maintain this suit is governed by the so-called Business Corporation Act of 1933. That question is discussed at length by the court below (R. 213) and we only add to what is there said by pointing out that the substance of section 79 of the 1919 Act was carried forward into the 1933 Act, in section 94 thereof.

Petitioner suggests that section 79 relates to the "statutory liabilities" of officers and stockholders (Pet. p. 11).

Reference is had to the *Flynn Coal Co.* case. But that case, as we have pointed out, clearly regards section 79 as applicable to cases involving the "trust fund doctrine." Furthermore, section 79 by its very terms does not admit of petitioner's suggested interpretation. Section 79 of itself does not create any liability or remedy. It merely preserves as against dissolution any liability otherwise existing and any remedy otherwise appropriate and applicable. It would be difficult to conceive of any broader language than that contained in section 79 in preserving rights and remedies against corporations and their directors and stockholders in the event of dissolution—subject only to the time limitation there expressed.

Nowhere in its petition does petitioner explain its delay in asserting its claims against C. T. C. Investment Company or against its stockholders or against its debtors. As the Appellate Court pointed out in construing the 1919 Act the 2-year limitation period in section 79 is not a mere statute of limitations but is an integral part of the cause of action. Petitioner has failed to bring itself within the terms of the statute. Its delay was of its own volition. The penalties thereof, if any, are not to be visited upon the individual defendants herein.

III.

THE COURT BELOW HAS PROPERLY FOLLOWED THE ILLINOIS DECISIONS AS TO THE APPLICABILITY OF THE ABOVE STATUTORY PROVISIONS TO THIS CASE.

The petition herein seems to assert two grounds for the granting of the writ. First (Pet. p. 6), that the

> "failure of the court below to ascertain and apply the law of Illinois warrants review by this court,"

and, second, if we understand it correctly, that the decision of the court below was contrary to the Illinois law. The second ground, however, is not in reality a separate and

additional ground for the writ. In truth it is inconsistent therewith. If the court below has in fact failed to ascertain and apply the Illinois law then the only order which this court would enter upon final hearing would be a direction to the court below to consider and decide the case in conformity to the Illinois law. *Klaxon Co.* v. *Stentor Electric Mfg. Co., Inc.*, ... U. S. ....., decided June 2, 1941. The question would seem to be, therefore, as to whether the court below in deciding this case proceeded contrary to the rule in *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64. That the court below was fully aware of that case and its requirements is shown by the following statement in its opinion:

> "However, we cannot concern ourselves with statutes and decisions of other states in view of *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64. Under the Illinois laws, in order to grant any relief demanded we think that the C. T. C. Investment Company was an indispensable party defendant in view of the allegations of the bill and the specific relief sought by the prayer which asked no general relief. However we are convinced by the same authorities that it could not be joined because it had already been dissolved for more than two years. Hence the motions to quash and to dismiss were properly sustained." (Rec. 214.)

Under the rulings of this court the Federal courts are required to follow state intermediate courts of appeal in determining the law of the state. (*West, et al.* v. *American T. & T. Co.*, ... U. S. ....., decided December 9, 1940; *Fidelity Union Trust Co., et al.* v. *Field*, ... U. S. ....., decided December 9, 1940; *Stoner* v. *New York Life Insurance Co.*, ... U. S. ....., decided December 23, 1940.)

As to the second supposed ground for the writ petitioner cites no Illinois cases whatsoever holding contrary to those of the Appellate Court expressly construing and applying sections 14, 53 and 79 of the 1919 Act. Obviously the court below was bound to follow those de-

cisions as it did. The petitioner's real complaint seems to be that the Appellate Court has a different view of the statute than has petitioner. As has heretofore been pointed out, *Hill* v. *Gruell*, the one case upon which petitioner so strongly relies, is in no way contrary to the Illinois decisions in question. The statute in force when that case was decided did not contain the two-year limitation which was deliberately put into section 79 when the 1919 Act was passed. And in its factual situation, the *Gruell* case is in no way comparable to the case at bar.

Conclusion.

In *Furness, Withy & Co.* v. *Yang-Tsze Insurance Association*, 242 U. S. 430, 433-434, this court took occasion to say:

> "* * * Nevertheless, in the circumstances, we think it was incumbent upon counsel for both sides to see that the petition and reply thereto disclosed the real situation. The oversight has resulted in unfortunate delay and needless consumption of time.
>
> "During the last term one hundred fifty-four petitions for certiorari were presented and acted upon. Because of recent legislation—Act of September 6, 1916, c. 448, 39 Stat. 726—their number hereafter may greatly increase. Such petitions go first to every member of the court for examination, and are then separately considered in conference. This duty must be promptly discharged. We are not aided by oral arguments and necessarily rely in an especial way upon petitions, replies and supporting briefs. Unless these are carefully prepared, contain *appropriate* references to the record and present with *studied accuracy, brevity and clearness* whatever is essential to ready and adequate understanding of points requiring our attention, the rights of interested parties may be prejudiced and the court will be impeded in its efforts properly to dispose of the causes which constantly crowd its docket."

The fact that no supporting brief has been filed herein by petitioner to the end that both this court and these re-

spondents may ascertain the process of legal reasoning upon which petitioner founds its contention that it is enabled either upon the trust fund doctrine or otherwise to bring a suit directly upon Exhibits VII and VIII against the signers thereof as if petitioner were an actual party thereto, the further fact that it has continually shifted its position throughout this proceeding—adopting certain theories in one court only to abandon them in another—and the further fact that the present petition does not accurately disclose the real nature of the proceeding here involved nor the issues which were presented to and decided by the court below, places a burden upon these respondents, and indeed upon this court, which they or it should not be asked or required to assume.

A petition for writ of certiorari is an application to this court to review specific holdings of the court to which the writ is sought to be directed. It is not intended to provide means for a litigant, even though it be a Governmental agency like petitioner, to embark upon a process of evolving various theories limited only by the ingenuity of counsel in the hope that somewhere in the process of review some one or more of such theories will catch on. No more is a petition for certiorari intended as a means to a litigant merely for the purpose of securing a further or additional hearing of his claims. As this court so well said in *Magnum Import Co.* v. *Coty*, 262 U. S. 159, 163,

> "The jurisdiction [by certiorari] was not conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another hearing."

The idea presented in its petition in this court that the court below in deciding this case has failed to follow the principles announced in *Erie R. R. Co.* v. *Tompkins* is a pure afterthought. It would be strange indeed were the court below to have fallen into such error in the face of the insistence on the part of the individual defendants herein that the case be decided in accordance with Illinois law—precisely what the court below ultimately did in its

application of the provisions of the 1919 Illinois Corporation Act.

In its present petition petitioner has attempted to camouflage the controversy between it and the individual defendants by claiming that it, as a creditor of C. T. C. Investment Company, is simply seeking to reach certain assets of the corporation which the individual defendants as stockholders have appropriated to themselves at petitioner's expense. In truth petitioner is attempting to bring suit upon contracts to which it is not a party. A mere cursory reading of the petition herein without knowledge of what this case is about might lead the reader to believe that the individual defendants as stockholders of C. T. C. Investment Company had entered into some fraudulent arrangement whereby they had taken over the assets of that company to the exclusion of its creditors. There is no such issue in this case, and no such controversy, and there is no such factual situation.

The judgment of the trial court in sustaining the motions to quash the purported service and return upon the C. T. C. Investment Company and dismissing the Complaint as against the individual defendants as the signers of Exhibits VII and VIII was plainly right. In affirming the judgment of the trial court, the court below was also plainly right.

The petitioner discloses no error in those holdings, and in any event, discloses no adequate grounds for the granting of certiorari.

Respectfully submitted,

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W. T. DURBIN,
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Counsel for Fletcher M. Durbin, Angus S. Hibbard, C. M. Moderwell, and John A. McCormick, Respondents herein.

APPENDIX.

Statutes Involved.

An Act in relation to corporations for pecuniary profit, approved June 28, 1919, in force July 1, 1919 (Cahill's Ill. Rev. Stat. 1931, Ch. 32, Secs. 14, 53, 79):

"Sec. 14. All corporations organized under the laws of this State, whose powers may have expired by limitation or otherwise, shall continue their corporate capacity for two years for the purpose only of collecting debts due such corporation and selling and conveying the property and effects thereof. Such corporations shall use their respective names for such purposes and shall be capable of prosecuting and defending all suits at law or in equity."

"Sec. 53. After an adjudication of bankruptcy, or after an execution has been so returned, or has remained unsatisfied for more than ten days, after a demand made, or after dissolution or cessation of business leaving debts unpaid, any creditor may bring suit in equity, in any court having general jurisdiction in the county within which the principal office of the corporation is located on behalf of himself and of all other creditors of the corporation, against all persons who are liable in any way for the debts of the corporation, by joining the corporation in such suit. After exhausting the assets of such corporation, each stockholder may be required to pay his *pro rata* share of such debts and liabilities to the extent of the unpaid portion of the stock and may, in addition thereto, be required to pay his *pro rata* share of not to exceed two weeks unpaid wages of all the employees of the corporation; * * *"

"Sec. 79. The dissolution, for any cause whatever, of any corporation, shall not take away or impair any remedy given against such corporations, its officers, or stockholders, for any liabilities incurred previous to

its dissolution, if suit therefor is brought and service of process had within two years after such dissolution."

An Act to regulate the practice in courts of chancery, approved March 15, 1872, in force July 1, 1872 (Ill. Rev. Stat. 1939, Ch. 22, Sec. 49):

"SEC. 49. Whenever an execution shall have been issued against the property of a defendant, on a judgment at law or in equity, and shall have been returned unsatisfied, in whole or in part, the party suing out such execution may file a complaint against such defendant, and any other person, to compel the discovery of any property or thing in action, belonging to the defendant, and of any property, money, or thing in action due to him, or held in trust for him, and to prevent the transfer of any such property, money or thing in action, or the payment or delivery thereof to the defendant, except when such trust has, in good faith, been created by, or the fund so held in trust has proceeded from, some person other than the defendant himself. The court shall have power to compel such discovery, and to prevent such transfer, payment, or delivery, and to decree satisfaction of the sum remaining due on such judgments, out of any personal property, money, or things in action, belonging to the defendant, or held in trust for him, with the exception above stated, which shall be discovered by the proceedings in chancery, whether the same were originally liable to be taken in execution at law or not: Provided, that no answer made to any complaint filed under this and the preceding section shall be read in evidence against the defendant on the trial of any indictment for fraud charged in the complaint."

Illinois Business Corporation Act of 1933 as amended (Ill. Rev. Stat. 1939, Ch. 32):

"157.86. JURISDICTION OF COURT OF EQUITY TO LIQUIDATE ASSETS AND BUSINESS OF CORPORATION. Courts of equity shall have full power to liquidate the assets and business of a corporation:

"* * *

"(b) Upon the suit of a creditor whose claim has either been reduced to judgment and an execution thereon returned unsatisfied, or whose claim is admitted by the corporation, when in either case it is made to appear that the corporation is unable to pay its debts and obligations in the regular course of business as they mature.

"* * *

"157.94. SURVIVAL OF REMEDY AFTER DISSOLUTION. The dissolution of a corporation either (1) by the issuance of a certificate of dissolution by the Secretary of State, or (2) by the decree of a court of equity when the court has not liquidated the assets and business of the corporation, or (3) by expiration of its period of duration, shall not take away or impair any remedy given against such corporation, its directors, or shareholders, for any liability incurred prior to such dissolution if suit thereon is brought and service of process had within two years after the date of such dissolution. Such suits may be prosecuted against and defended by the corporation in its corporate name."

Office - Supreme Court, U. S.
FILED
JUL 5 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 105

RECONSTRUCTION FINANCE CORPORATION,
Petitioner,

vs.

LUCIUS TETER, ET AL.

ANSWER OF CERTAIN RESPONDENTS TO PETITION FOR A WRIT OF CERTIORARI.

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THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

INDEX.

PAGE

Statement of facts 1
The contested issues 3
Argument 5
Conclusion 18

CITATIONS.

Allis-Chalmers Mfg. Co. v. Chicago, 297 Ill. 444..... 18
A. J. Bates v. United States, 3 Fed. Supp. 245..... 11
Bishop v. Chicago Rys. Co., 303 Ill. 273..... 7
Blair v. Illinois Steel Co., 159 Ill. 350..... 13
Blanchard v. Gay Co., 289 Ill. 413.....6, 11
Chicago Title & Trust Company v. Forty-one Thirty-six Wilcox Corporation, 302 U. S. 120.....7, 11
City Insurance Co. v. Commercial Bank, 68 Ill. 340... 10
Clapp v. Peterson, 104 Ill. 26..... 10
Clarkson v. E. & N. S. Dispatch, 6 Ill. App. 284..... 9
Consolidated Coal Co. v. Flynn Coal Co., 274 Ill. App. 405 .....6, 7, 11
Coquard v. National Linseed Oil Co., 171 Ill. 480.....6, 11
Dukes v. Harrison & Reidy, 270 Ill. App. 372....6, 7, 11, 12
Eads v. Mason, 16 Ill. App. 545..... 13
Gallagher v. Schmidt, 313 Ill. 40..... 18
Gallopin v. Continental Casualty Co., 290 Ill. App. 8.. 15
Henry v. Jewett, 94 Ill. App. 667..... 11
Herzon v. Eisenstein, 294 Ill. App. 265..... 15
Hill v. Gruell, 42 Ill. App. 41..... 9
Life Association of America v. Fassett, 102 Ill. 315.... 10
McDowell v. Cochran, 11 Ill. 31..... 13
Minnesota v. Northern Utilities Co., 184 U. S. 199.... 17
Mortimore v. Bashmore, 317 Ill. 535..... 17
National Bureau, etc. v. Tax Service Ass'n., 290 Ill. App. 152 12

Peoples National Bank v. Cosden, 283 Ill. App. 31... 16
People v. Shurtleff, 353 Ill. 248.....6, 11
Potter v. Couch, 141 U. S. 296..... 8
Alexander H. Revell & Co. v. C. H. Morgan Grocery Co., 214 Ill. App. 526..... 15
Sarelas v. McCue Co., 291 Ill. App. 540.....6, 7, 11
Schumacher v. Klitzing, 353 Ill. 530..... 17
Singer v. Hutchinson, 183 Ill. 606..... 9
Singer v. Hutchinson, 176 Ill. 48..... 8
Spindle, Assignee v. Shreve, 111 U. S. 542..... 8
State Street Furniture Co. v. Armour & Co., 259 Ill. App. 589 16
Steere v. Hoagland, 39 Ill. 264..... 13
Stern v. Gelder, 224 Ill. App. 89..... 16
Swan Land & Cattle Co. v. Frank, 39 Fed. 456..... 17
N. Z. Taylor v. Anderson, 275 U. S. 431..... 18
Tarbell v. Page, 24 Ill. 46..... 9
U. S. v. R. B. McDanel Co., 16 Fed. Supp. 905..... 18
Wheeler v. Pullman Iron & Steel Co., 143 Ill. 197.... 9
Wiedoeft v. Frank Holton & Co., 294 Ill. App. 118....6, 11
Charles A. Zahn Co. v. United States, 6 Fed. Supp. 317 12

STATUTES.

Section 14, "The General Corporation Act" of 1919, Cahill's Revised Statutes, 1931, Chap. 32..... 19
Section 53, "The General Corporation Act" of 1919, Cahill's Revised Statutes, 1931, Chap. 32..... 19
Section 79, "The General Corporation Act" of 1919, Cahill's Revised Statutes, 1931, Chap. 32..... 19
Section 22, Civil Practice Act of 1933, Ill. Revised Stat., 1939, Chap. 110, Section 146..... 21
Section 18, Practice Act of 1907, Smith-Hurd Ill. Rev. Stat. 1931, Chap. 110, Section 18..... 20
Illinois Chancery Act, Section 49..... 20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 105.

RECONSTRUCTION FINANCE CORPORATION,
Petitioner,

vs.

LUCIUS TETER, ET AL.

ANSWER OF CERTAIN RESPONDENTS TO PETITION FOR A WRIT OF CERTIORARI.

Now come Lucius Teter, John W. O'Leary, Henry H. Hilton, Carol Allen Buckingham and Tracy Wilson Buckingham, as Executors of the Estate of George Tracy Buckingham, Deceased, Samuel M. Hastings, J. W. Marshall, C. H. Fox, individually and as (alleged) stockholders of C. T. C. Investment Company, Joseph Duner and Alice Haven Requa, as Executrix of the Estate of Charles H. Requa, Deceased, respondents in the above entitled cause, and present this their answer to the petition for a writ of certiorari, and in support thereof, respectfully state to the court as follows:

STATEMENT OF FACTS.

Petitioner, on page 3, refers to a certain guaranty. It should be noted that this guaranty was made by C. T. C. Investment Company, *and not by any of the individual defendants* (R. 148-150, Exhibit V).

It should be noted that the indemnity agreement referred to on page 4 as being executed (among others) by the individual defendants, ran to *C. T. C. Securities Company and C. T. C. Investment Company, and to no one else,* and indemnified expressly "against any loss of any nature that may be incurred in connection with any present or future purchases of any of the securities of or any loans to Associated Power and Light Corporation, Union Power and Light Company of Cuba or any committee or corporation in any way allied or affiliated to either of said corporations, and with respect to no other losses." (R. 159, Exhibit VIII).

At the bottom of page 4, Petitioner states "the C. T. C. Investment Company continued to act as a corporation long after its dissolution". This is a misstatement of fact and not contained in any allegation of the amended complaint (hereinafter called "complaint"). As to the remainder of the paragraph, the complaint alleges the dissolution of C. T. C. Investment Company on May 20, 1933, over six years before the filing of this proceeding (R. 125).

Petitioner in the complaint did not, as assignee bringing action in its own name, *on oath*, allege that it is the actual bona fide owner of any non-negotiable chose in action and set forth how and when it acquired title.

The National Bank of the Republic of Chicago assigned, by Exhibit IX, on July 25, 1931, whatever rights under which Petitioner now is claiming, to Chicago Trust Company (R. 160). There is no allegation in the complaint of any loss occurring to C. T. C. Investment Company prior to July 25, 1931.

No proceedings were ever heretofore brought by R. F. C. or by any predecessor assignee against C. T. C. Investment Company or individual defendants with respect to securities or with respect to indemnity agreements.

THE CONTESTED ISSUES.

The complaint was dismissed pursuant to a motion to dismiss which raised numerous defenses thereto (R. 169-178). In the first section of the motion, the issues arise upon the challenge to the jurisdiction of the court, which, it is contended, is without jurisdiction (a) over the subject matter of the suit; and (b) over the defunct C. T. C. Investment Company, named as the principal defendant; and (c) by reason of the insufficiency of service upon the defunct C. T. C. Investment Company; and (d) by reason of Petitioner's failure to state under oath, that it is the actual bona fide owner of any of said choses in action (R. 169-174).

The contested issues in the second section of the motion to dismiss are those which contend that the complaint fails to show a cause of action on which relief sought can be granted (R. 174-178).

Petitioner presents only one question, namely, its so-called "trust fund" doctrine. However, a review of *only* the question presented by the Petition would avail nothing, inasmuch as the order sustaining the motion to dismiss is supported by various basic jurisdictional defects not now presented by the Petitioner. Such basic defects are:

(a) Can Petitioner, as assignee of a non-negotiable chose in action, sue C. T. C. Investment Company on its guaranty made to the National Bank of the Republic of Chicago (Exhibit V, R. 148), when Section 79 of the 1919 Corporation Act of Illinois permits a suit against a corporation for a period of only two years after dissolution; and until loss has occurred to C. T. C. Investment Company does there exist any cause of action in favor of C. T.

C. Investment Company against individual defendants under special indemnity agreement (Exhibit VIII, R. 159)?

(b) Has the court jurisdiction to enter a decree where a necessary party cannot be made a party to the proceedings, namely, can C. T. C. Investment Company, being legally dissolved more than two years prior to the filing of the complaint be made a party defendant?

(c) Does any cause of action exist giving jurisdiction to the court when Petitioner filing suit in its own name as an assignee of a non-negotiable chose in action did not comply with either Section 22 of the Civil Practice Act of 1933 (Illinois Revised Statutes 1939, Chapter 110, Section 146) or with Section 18 of the Practice Act of 1907 (Smith-Hurd Illinois Revised Statutes 1931, Chapter 110, Section 18) which provides as a substantive rule of law that the assignee and owner of a non-negotiable chose in action may sue thereon in his own name, but must in his pleading, on oath, allege that he is the actual bona fide owner thereof and set forth how and when he acquired title? (See appendix for statutes.)

ARGUMENT.

I.

PETITIONER HAS NO CAUSE OF ACTION AGAINST INDIVIDUAL DEFENDANTS UNDER THE SO-CALLED "TRUST FUND" DOCTRINE.

Petitioner seeks a review of the decision rendered below upon the ground that it is in flat contradiction of the Illinois law, with respect to Petitioner's so-called "trust fund" doctrine. An examination, however, of the Court's opinion clearly shows that the court below, on the contrary, followed the Illinois law by refusing to uphold an action in which an alleged creditor prior to judgment and execution against principal debtor corporation and failing to join principal debtor corporation as a party to the proceedings is attempting to sue directly alleged third party debtors of a corporation without complying with either Section 49 of the Chancery Act of Illinois (Ill. Rev. Stat. 1939, Ch. 22, Sec. 49) or Section 14, 53 and 79 of the 1919 Corporation Act of Illinois (Cahill's Ill. Rev. Stat. 1931, Ch. 32) which deal with the subject matter of this case. (See appendix for statutes.)

Further, Petitioner contends that these statutes have no bearing on such a suit as was filed in the instant case and if they do, it creates a serious inroad on the rights afforded creditors of Illinois corporations.

On the contrary, Respondents contend that where the Legislature of a State has enacted clear and unmistakable statutes prescribing an adequate and reasonable cause of action to enforce a creditor's rights, it would be an inroad on justice to permit a creditor recovery when such statutes are completely ignored.

Respondents contend that the jurisdiction of a court to

entertain a suit by a creditor to collect claims against corporations from corporate debtors and from those liable for the corporate debts, arises solely from the specific provisions of the statute under which the corporation was organized and dissolved. That jurisdiction is not conferred by the general equity power of the State.

Wiedoeft v. *Frank Holton & Co.*, 294 Ill. App. 118, 127-8.

Sarelas v. *McCue Co.*, 291 Ill. App. 540, 542-5.

Dukes v. *Harrington & Reidy*, 270 Ill. App. 372, 381-2.

People v. *Shurtleff*, 353 Ill. 248, 260-1.

Blanchard v. *Gay Co.*, 289 Ill. 413, 419-21.

Lequard v. *National Linseed Oil Co.*, 171 Ill. 480, 485.

Consolidated Coal Co. v. *Flynn Coal Co.*, 274 Ill. App. 405, 410-12.

The statute under which C. T. C. Investment Company *was organized* and which was in effect until after it *was dissolved*, was the General Corporation Act of 1919.

Sections 14, 53 and 79 of that Statute are controlling and determinative of the case at bar.

Section 53 is the section of the 1919 Corporation Act which confers jurisdiction of a "creditors" suit, such as the suit at bar, to enforce claims *through* the corporation and *against* those who are allegedly indebted to the corporation, or who are allegedly liable for its debts.

That section can be invoked after the dissolution of the corporation leaving debts unpaid *only* by (a) a creditor; and (b) *by making the dissolved corporation a party defendant*. However, that jurisdiction to join the corporation as a party defendant extends for a period of only two years after dissolution and is terminated at that time by Section 79 of the 1919 Corporation Act.

Section 79 provides that for a period of *two years* after

dissolution, the corporation, its officers and stockholders, may be sued on any pre-existing cause of action (including, of course, a suit based on Section 53) but that after the expiration of the two year period, no suit of any kind, by anybody, on any cause of action, may be brought *against the corporation, or its officers or its stockholders.*

Section 14 provides that for a period of two years after dissolution, a corporation may, in its own name, liquidate its assets and collect from those who are indebted to it and for those purposes only, may sue or be sued. After such termination, the corporation *cannot sue on any cause of action.*

This two year period under Sections 14 and 79 is not a statute of limitation—it is a condition precedent to any right *by, through, or against the corporation, or its officers, or its stockholders.*

Dukes v. *Harrison & Reidy*, 270 Ill. App. 372, 379.
Sarelas v. *McCue Co.*, 291 Ill. App. 540, 545.
Bishop v. *Chicago Rys. Co.*, 303 Ill. 273, 276-7.

Section 53 is the only authority for a "creditor's" suit and requires, as a *"sina qua non"* that the corporation be joined as defendant. Sections 14 and 79 prohibit any suit being brought after the two year period by or against the corporation, or through the corporation. C. T. C. Investment Company was dissolved over six years prior to the commencement of this suit and cannot now sue or be sued and cannot now be made a party to this suit. Thus Petitioner is not able to comply with any of these requirements and this suit must fail for want of the Court to have jurisdiction to entertain it.

Dukes v. *Harrison & Reidy*, 270 Ill. App. 372, 379-80.
Consolidated Coal Co. v. *Flynn*, 274 Ill. App. 405, 410-12.
Chicago Title & Trust Company v. *Forty-one Thirty-six Wilcox Corporation*, 302 U. S. 120, 124.

Respondents further contend that aside from actions brought pursuant to the said above sections of the 1919 Corporation Act, any other action brought by a creditor in equity to recover from third party debtors must be brought in compliance with Section 49 of the Chancery Act of Illinois.

Spindle, Assignee v. *Shreve*, 111 U. S. 542, 546-47; 28 L. Ed. 572; 4 S. Ct. 522.

Potter v. *Couch*, 141 U. S. 296, 319-20; 36 L. Ed. 721; 11 S. Ct. 1005.

Ladd v. *Judson*, 174 Ill. 344, 349-51.

However, in order to comply with that section, it is necessary to make the principal debtor a defendant. Further, that section requires that a judgment be first obtained against the debtor with the return of execution unsatisfied in whole or in part. So again, under Section 49, Petitioner is met by the obstacle that the provisions of Section 79 of the 1919 Corporation Act preclude the joining of C. T. C. Investment Company, as principal debtor, and the obtaining of a judgment against C. T. C. Investment Company and, therefore, preclude complying with the conditions laid down by Section 49 of the Chancery Act as a prerequisite to a cause of action.

As to the cases cited on page 7 of Petitioner's brief to sustain its so-called "trust fund" theory, it must be noted that all of those cases were decided prior to the 1919 Illinois Corporation Act.

Prior to 1919, the statute extending the time after dissolution within which suits could be brought against the corporation, its officers or stockholders, *was without time limit.* (*Singer* v. *Hutchinson*, 176 Ill. 48, 51.) The 1919 statute, by Section 79, shortened that post mortem period *to two years.*

Further comments on said cases are:

(1) *Hill* v. *Gruell*, 42 Ill. App. 41 (1891).

Petitioner states (page 9) that this case specifically held that the statutes were not exclusive. This is misleading. This case was decided in 1891, years prior to the 1919 Corporation Act, and was in the nature of a *creditor's bill* seeking recovery upon a *judgment* which Plaintiff had obtained against the corporation *prior* to the bringing of this action. In view of subsequent cases, the most that can be said of some of the language quoted is that it is unusual dictum, but not the law. As far as we can find, this case was never cited in any subsequent case.

(2) *Singer* v. *Hutchinson*, 183 Ill. 606 (1900).

This was a creditor's bill based on a *judgment* obtained against corporation on claim existing prior to dissolution.

(3) *Clarkson* v. *E. & N. S. Dispatch*, 6 Ill. App. 284 (1880).

Again, creditor's bill based upon *judgment* rendered.

(4) *Wheeler* v. *Pullman Iron & Steel Co.*, 143 Ill. 197, 204 (1892).

Bill filed to dissolve corporation, appoint receiver, asking for an accounting, and to marshal and distribute assets after payment of debts. Facts alleged did not bring bill within Section 25 of the Corporation Act. *Court held Section 25 must be complied with as court had no jurisdiction under general equity powers to grant relief prayed for, as Section 25 was exclusive in governing corporations.*

(5) *Tarbell* v. *Page*, 24 Ill. 46, 47 (1860).

Plaintiff brought suit against stockholders under individual liability clause of the general manufacturing law of 1849. Act provided no stockholder shall be personally liable for corporate debt which was not paid within one year from time it became due, *unless suit for collection be*

brought against corporation within one year from the time it became due.

Suit was not brought within proper period and court sustained demurrer as holding compliance with act essention to cause of action.

(6) *Life Association of America* v. *Fassett*, 102 Ill. 315, 323 (1892).

Plaintiff sued out an attachment three days before corporation was dissolved. Receiver of assets of dissolved corporation attempted to defeat lien created by attachment. Court held sections of Corporation Act then in force permitted corporations, after dissolution, to exist for the purpose of settling up affairs and having their property applied for the payment of just debts, and that the corporation still existed for the purpose of enforcing the attachment lien.

(7) *City Insurance Co.* v. *Commercial Bank*, 68 Ill. 340 (1873).

This case holds that where a Rhode Island Bank has forfeited its charter to the State of Rhode Island, action may be maintained in Illinois against property located in Illinois for the payment of its debts.

(8) *Clapp* v. *Peterson*, 104 Ill. 26 (1882).

Plaintiff, Peterson, sold property to corporation. Plaintiff later filed bill to set sale aside for fraud and obtained a *money decree*. After execution issued, having been returned *nulla bona*, plaintiff filed bill in chancery to subject property in possession of defendant, Clapp, to payment of decree.

Clapp had previously received corporate property in exchange for surrender of stock of corporation. Court held that property so received by Clapp was subject to payment of debt of plaintiff.

(9) *Henry* v. *Jewett*, 94 Ill. App. 667 (1900).

This case was a creditor's bill seeking payment of a certain *judgment* against a corporation from the principal stockholder of the corporation who had received all of the proceeds of the sale of the assets of the corporation.

The most that can be said of said doctrine as construed by the Illinois cases so cited, is that equity does not permit corporate assets to be appropriated by stockholders to themselves where the corporation is insolvent, or would be made insolvent thereby, or where corporate debts are left unpaid, but this only to the extent of the corporate assets so received. The basis is that of legal fraud in appropriating assets which should have gone to pay debts. *The theory, however, never extended to permit creditors to sue directly third party debtors* of the corporation, and all of the cited cases were cases in which a creditor had previously obtained a judgment against the corporation or had perfected a lien upon its assets, or had complied with the then corporate statutes, none of which had Petitioner, nor any former assignee, done in this case.

The following cases construing the Illinois statutes are controlling of the subject matter:

Chicago Title & Trust Company v. *Forty-one Thirty-six Wilcox Corporation*, 302 U. S. 120.

Wiedoeft v. *Frank Holton & Co.*, 294 Ill. App. 118, 127-9.

Dukes v. *Harrison & Reidy*, 270 Ill. App. 372, 380-1.

Consolidated Coal Co. v. *Flynn Coal Co.*, 274 Ill. App. 405, 410-12.

Sarelas v. *McCue Co.*, 291 Ill. App. 540, 542-5.

People v. *Shurtleff*, 353 Ill. 248, 260-1.

Blanchard v. *Gay & Co.*, 289 Ill. 413, 419-20.

Coquard v. *National Linseed Oil Co.*, 171 Ill. 480, 484.

A. J. Bates v. *United States*, 3 Fed. Supp. 245.

Charles A. Zahn Co. v. *United States,* 6 Fed. Supp. 317.

National Bureau, etc. v. *Tax Service Ass'n.,* 290 Ill. App. 152, 157-8.

In the case of *Dukes* v. *Harrison & Reidy,* 270 Ill. 372, the opinion states at pages 378-9:

> "The defendant corporation contends that section 14 of the Corporation Act is not a statute of limitation of action, and that neither paragraph 26 nor any other section of the Limitations Act refers to or is applicable to sections 14 or 79 of the Corporation Act; that section 14 places a definite limit on corporate capacity to sue and be sued; that it provides that corporations whose powers have expired by limitation or otherwise shall continue their corporate capacity for two years for the purpose only of collecting debts due such corporations and selling and conveying the property and effects thereof and for such purpose may prosecute or defend all suits in the corporate name; that after that period of two years has expired the corporation is legally dead for all purposes and that there is nothing in any provision of the Limitations Act which revives it for any purpose; that it has no corporate capacity of any kind, no officers or agents, and therefore cannot be sued or brought within the jurisdiction of the court by the delivery of a summons to one of its former officers."

The court sustained this contention. After holding that the corporation in that case (which had been dissolved more than two years) had no capacity to sue or be sued, because of Sections 14 and 79, the court said (pp. 381-2):

> "The defendants further contend that if the contention that the defendant corporation cannot legally be made a party defendant to this suit is held to be meritorious then the entire case of complainant falls because of section 53 of the Corporation Act, Cahill's St. ch. 32, § 53, which makes it necessary to join the corporation as a party defendant. *The right of creditors to bring a suit of this nature is conferred by sec-*

tion 53 of Chapter 32, which provides that the corporation shall be made a party defendant. The complainant creditor must bring her suit within the provisions of that section if she wishes to avail herself of the remedy provided therein. *Section 53 of the Corporation Act must be construed with sections 14 and 79 of the same act,* and it is apparent that complainant cannot avail herself of the remedy provided by this statute for the reason that her bill of complaint was not filed until September 14, 1931, which was more than two years after the dissolution of the corporation."

On page 11 of the Petition, it is stated that "When Section 79 refers to the liabilities of officers and stockholders, it would seem only to mean their statutory liabilities. Cf. *Consolidated Coal Company* v. *Flynn Coal Co.*, 274 Ill. App. 405."

It should be noted that on page 409 of the opinion in the case above referred to, a proposed amended bill of complaint was tendered to the court, which proposed bill of complaint set out the various statutory liabilities contained in the original complaint, and in addition set forth various illegal acts of the president of defendant Coal Company not covered by statutory liability. The court denied leave to file the proposed amended bill of complaint on the same grounds it dismissed the original bill of complaint, namely, that Section 79 of the Corporation Act applied to all of the allegations in both the original complaint and the proposed amended bill of complaint.

On page 10 of the Petition, it is stated "The rule of *Hill* v. *Gruell* has not been qualified and is reinforced by other Illinois decisions holding that Section 49 of the Chancery Act is not exclusive. *Eads* v. *Mason*, 16 Ill. App. 545, 547, 548; *Steere* v. *Hoagland*, 39 Ill. 264, 265-267; *McDowell* v. *Cochran*, 11 Ill. 31, 33; *Blair* v. *Illinois Steel Co.*, 159 Ill. 350, 358-360."

These cases are far afield from the case at bar. The

first three of these cases were expressly governed by the Statute of Wills. The last case, the court held, involved the same principal and was an exception to the general rule. In the case of *Eads* v. *Mason,* it was held that the requirement that an execution must issue on judgment and be returned unsatisfied before a court of equity will entertain a bill to reach assets of the judgment debtor was *waived by statute of wills where the assets of the judgment debtor were held by an administrator of the debtor's estate.* The case of *Steere* v. *Hoagland* also involved an administrator of a debtor's estate. Also, the case of *McDowell* v. *Cochran* involved an administrator of a debtor's estate. Further, in the case of *Blair* v. *Illinois Steel Co.,* the debtor corporation was insolvent and all of its property was in the hands of a receiver in a suit in equity brought under Section 25 of the then Corporation Act. The court, in this case, held that where property was in the hands of a receiver, the case was one of an exception to the general rule that there must be a return of *nulla bona* upon which to base the right of a creditor to contest, in equity, the transfer of property made by the debtor.

II.

PETITIONER AS ASSIGNEE OF A NON-NEGOTIABLE CHOSE IN ACTION, CANNOT SUE C. T. C. INVESTMENT COMPANY (BY VIRTUE OF SECTION 79 OF 1919 CORPORATION ACT) ON ITS GUARANTY MADE TO THE NATIONAL BANK OF THE REPUBLIC OF CHICAGO (EXHIBIT V) AND UNTIL LOSS HAS OCCURRED TO C. T. C. INVESTMENT COMPANY NO CAUSE OF ACTION COULD HAVE ARISEN IN FAVOR OF C. T. C. INVESTMENT COMPANY AGAINST INDIVIDUAL DEFENDANTS UNDER SPECIAL INDEMNITY AGREEMENT (EXHIBIT VIII).

Petitioner, on page 5, states that "In 1939 to recover upon the guaranties of the aforesaid notes pledged by the bank (R. 126-127), * * * Petitioner filed suit in the District Court (R. 2, 110)".

Respondents contend that no cause of action can exist with respect to guaranty agreement (Exhibit V) because Petitioner, even if vested with all the rights of The National Bank of the Republic of Chicago must assume also the burdens and could not have brought any action with respect to the guaranty against C. T. C. Investment Company. Such Company was dissolved in 1933, more than six years prior to the filing of Petitioner's action. Again, Section 79 of the 1919 Corporation Act, limiting such cause of action to two years after the date of such dissolution, bars any such action.

Further, if C. T. C. Investment Company now sued on the special indemnity agreement between it and the individual defendants, defendants could defeat the suit by invoking Section 14 of the 1919 Corporation Act.

The same defenses would be available to individual defendants against Petitioner in any suit in which Petitioner bases its action against, by or through C. T. C. Investment Company.

Alexander H. Revell & Co. v. *C. H. Morgan Grocery Co.*, 214 Ill. App. 526, 528-9.

Gallopin v. *Continental Casualty Co.*, 290 Ill. App. 8, 13.

Herzon v. *Eisenstein*, 294 Ill. App. 265, 271-4.

Further, at the time The National Bank of the Republic assigned on July 25, 1931, by Exhibit IX, whatever interests it might have had in said Exhibits V and VIII, it could only assign a then existing cause of action, said Exhibits being non-negotiable choses in action. There is no allegation in the complaint, not even by way of conclusion, much less of a purchase and sale, of any loss to C. T. C. Investment Company occurring prior to July 25, 1931. Any loss after that, if one had occurred, and any

cause of action subsequently arising with respect to said loss, would not have passed to Petitioner.

State Street Furniture Co. v. *Armour & Co.*, 259 Ill. App. 589, 593.

Peoples National Bank v. *Cosden*, 283 Ill. App. 31, 38-9.

Stern v. *Gelder*, 224 Ill. App. 89, 91-2.

III.

COURT HAS NO JURISDICTION TO ENTER A DECREE WHERE C. T. C. INVESTMENT COMPANY, BEING LEGALLY DISSOLVED MORE THAN TWO YEARS (ACTUALLY SIX YEARS) PRIOR TO THE FILING OF THE COMPLAINT, CANNOT BE MADE PARTY DEFENDANT, AS C. T. C. INVESTMENT COMPANY IS A NECESSARY PARTY TO THE PROCEEDINGS.

C. T. C. Investment Company was dissolved some six years prior to the institution of these proceedings. By virtue of Section 79 of the Corporation Act, which permits suits against a dissolved corporation to be brought for a period of only two years after such dissolution, C. T. C. Investment Company cannot be a party to this suit, or any other suit. However, C. T. C. Investment Company, by virtue of the prayer of the complaint in this cause, must be joined as a necessary party.

It is a basic principle of equity that anyone who has an interest in the subject matter of a suit in equity is a necessary party; and that in the absence of a necessary party, the court will not enter a decree affecting that subject matter. If this were a separate suit against these indemnitors based on these premises of law and fact, the C. T. C. Investment Company is a party who has an interest in the subject matter. Indeed, on the face of the complaint, it has the only direct legal interest.

If such a suit had been brought in the lifetime of this corporation, or within two years after its dissolution and

it had not been made a party, the suit would have been dismissed when the court discovered (or even on its own motion) that a necessary party was not before the court.

Swan Land & Cattle Co. v. *Frank,* 39 Fed. 456-60.
Minnesota v. *Northern Securities Co.,* 184 U. S. 199, 246-7.
Schumacher v. *Klitzing,* 353 Ill. 530, 532-4.
Mortimore v. *Bashore,* 317 Ill. 535, 540-41.

IV.

COURT LACKS JURISDICTION AS NO CAUSE OF ACTION EXISTS ON COMPLAINT BROUGHT IN NAME OF ASSIGNEE OF NON-NEGOTIABLE CHOSE IN ACTION WHEN PETITIONER FAILED TO COMPLY WITH SECTION 18 OF THE 1907 ILLINOIS PRACTICE ACT AS AMENDED JULY 6, 1925 OR SECTION 22 OF THE ILLINOIS CIVIL PRACTICE ACT OF 1933.

Paragraph 39 of the complaint alleges that Petitioner "as the holder as assignee of said agreements and as assignee of the causes of action against the defendants named herein, and each of them, arising out of the agreements referred to herein, is the real party in interest in these proceedings * * *".

Petitioner brings this suit in its own name. The complaint is not sworn to nor is any affidavit of Petitioner, or anyone, attached thereto.

An assignee of a chose in action which is not a negotiable instrument by common law has no right to bring an action in his name based on the assigned chose in action. "He has no cause of action."

Illinois, in 1907 for the first time, by statute gave to an assignee of a chose in action the right to have a cause of action in his name. In 1933, the 1907 statute was replaced by a new statute, both, however, being substantially alike.

These statutes required that the pleading show that

plaintiff is the actual bona fide assignee and *owner*, and how and when he acquired title and *this he must show in a pleading under oath.* (See appendix for statutes.)

If his complaint is not under oath, or if under oath it fails to show that plaintiff is the actual bona fide owner of the chose in action and has "acquired title and ownership of it", then the plaintiff has no "cause of action". It is *not* that plaintiff in such case has a defective cause of action—*he has no cause of action.*

In the case at bar, the complaint is not sworn to and if it were, it fails to show bona fide ownership in Petitioner, as complaint states agreements were held as "collateral security" and not as bona fide owner. The "right, title and interest", by assignment (if any), is in the Receiver of Central Republic Trust Company—*not* in Petitioner.

N. G. Taylor v. *Anderson,* 275 U. S. 431, 438-9.
Gallagher v. *Schmidt,* 313 Ill. 40, 43-4.
Allis-Chalmers Mfg. Co. v. *Chicago,* 297 Ill. 444, 449-50.
U. S. v. *R. B. McDanel Co.,* 16 Fed. Supp. 905, 908.

Conclusion.

Wherefore, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Vincent O'Brien,
Tracy Wilson Buckingham,
Attorneys for Lucius Teter and Certain Other Respondents.

Vincent O'Brien,
Attorney for Carol Allen Buckingham and Tracy Wilson Buckingham, Executors of the Estate of George Tracy Buckingham, Deceased, Respondents.

APPENDIX.

An Act in relation to corporations for pecuniary profit, approved June 28, 1919, in force July 1, 1919 (Cahill's Ill. Rev. Stat. 1931, Ch. 32, Secs. 14, 53, 79):

SEC. 14. "All corporations organized under the laws of this State, whose powers may have expired by limitation or otherwise, shall continue their corporate capacity for two years for the purpose only of collecting debts due such corporation and selling and conveying the property and effects thereof. Such corporations shall use their respective names for such purposes and shall be capable of prosecuting and defending all suits at law or in equity."

* * * * *

SEC. 53. "After an adjudication of bankruptcy, or after an execution has been so returned, or has remained unsatisfied for more than ten days, after a demand made, or after dissolution or cessation of business leaving debts unpaid, any creditor may bring suit in equity, in any court having general jurisdiction in the county within which the principal office of the corporation is located on behalf of himself and of all other creditors of the corporation, against all persons who are liable in any way for the debts of the corporation, by joining the corporation in such suit. After exhausting the assets of such corporation, each stockholder may be required to pay his *pro rata* share of such debts and liabilities to the extent of the unpaid portion of the stock and may, in addition thereto, be required to pay his *pro rata* share of not to exceed two weeks unpaid wages of all the employees of the corporation; * * *."

* * * * *

SEC. 79. "The dissolution, for any cause whatever, of any corporation, shall not take away or impair any remedy given against such corporations, its officers, or stockholders, for any liabilities incurred previous to its dissolution, if suit therefor is brought and service of process had within two years after such dissolution."

An Act to regulate the practice in courts of chancery, approved March 15, 1872, in force July 1, 1872 (Ill. Rev. Stat. 1939, Ch. 22, Sec. 49):

SEC. 49. "Whenever an execution shall have been issued against the property of a defendant, on a judgment at law or in equity, and shall have been returned unsatisfied, in whole or in part, the party suing out such execution may file a complaint against such defendant, and any other person, to compel the discovery of any property or thing in action, belonging to the defendant, and of any property, money, or thing in action due to him, or held in trust for him, and to prevent the transfer of any such property, money or thing in action, or the payment or delivery thereof to the defendant, except when such trust has, in good faith, been created by, or the fund so held in trust has proceeded from, some person other than the defendant himself. The court shall have power to compel such discovery, and to prevent such transfer, payment, or delivery, and to decree satisfaction of the sum remaining due on such judgments, out of any personal property, money, or things in action, belonging to the defendant, or held in trust for him, with the exception above stated, which shall be discovered by the proceedings in chancery, whether the same were originally liable to be taken in execution at law or not: Provided, that no answer made to any complaint filed under this and the preceding section shall be read in evidence against the defendant on the trial of any indictment for fraud charged in the complaint."

SECTION 18 OF PRACTICE ACT OF 1907, AS AMENDED JULY 6, 1925.

"18. The assignee and bona fide holder of any chose in action not negotiable, heretofore, or hereafter assigned, may sue thereon in his own name, and he shall in his pleading on oath, or by his affidavit, where pleading is not required, allege that he is the actual bona fide owner thereto, and set forth how and when he acquired title; but in such suit there shall be allowed all

just set-offs, discounts and defenses, not only against the plaintiff, but also against the assignor or assignors, before notice of such assignment shall be given to the defendant; * * *."

SECTION 22 OF CIVIL PRACTICE ACT OF 1933.

"The assignee and owner of a non-negotiable chose in action may sue thereon in his own name, and he shall in his pleading on oath, allege that he is the actual bona fide owner thereof, and set forth how and when he acquired title; but such action shall be subject to any defense or set-off existing before notice of the assignment; * * *."

INDEX

	Page
1. Nature of this suit and the theories below	1
2. The liability of the respondent stockholders	2
3. The trust fund theory in Illinois	4
4. Section 49 of the Chancery Act	4
5. Section 53 of the 1919 Corporation Act	5
6. Section 79 of the 1919 Corporation Act	5
7. Other defenses	6

CITATIONS

Cases:	
Abrams v. *Roth & Co.*, 310 Ill. App. 490	5
Bacon v. *National Bank of Commerce*, 259 S. W. 244 (Texas)	3
Boyd v. *Hankinson*, 92 Fed. 49	3
Consolidated Coal Co. v. *Flynn Coal Co.*, 274 Ill. App. 405	6
Crumlish v. *R. R. Co.*, 28 W. Va. 623	3
Drennen v. *Jenkins*, 180 Ala. 261	3
Dukes v. *Harrison & Reidy*, 270 Ill. App. 372	6
Gaff v. *Flesher*, 33 Ohio St. 107	3
Hightower v. *Thornton*, 8 Ga. 486	3
Hill v. *Gruell*, 42 Ill. App. 411	5
Insurance Co. v. *Dunscomb*, 108 Tenn. 724	3
Marshall v. *Wittig*, 205 Wis. 510	3
Norton v. *Steinfeld*, 36 Ariz. 536	3
Rowland v. *Meader Furniture Co.*, 38 Ohio St. 269	3
Sarelos v. *McCue & Co.*, 291 Ill. App. 540	6
Standard Distilling Co. v. *Coal Co.*, 239 Ill. 600	5
Steere v. *Hoagland*, 39 Ill. 264	4
Stone v. *Edwards*, 32 Ga. App. 479	3
Wheeler v. *Pullman Iron & Steel Co.*, 143 Ill. 197	5
Statutes:	
Chancery Act, section 49	4
The 1919 Corporation Act:	
Section 53	5
Section 79	5
The 1933 Corporation Act (Ill. Rev. Stat. 1939, ch. 32):	
Sec. 86	5
Sec. 163	5

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 105

RECONSTRUCTION FINANCE CORPORATION, PETITIONER

v.

LUCIUS TETER, ET AL.

REPLY BRIEF FOR THE PETITIONER

Respondents challenge our abbreviated statement of facts as misleading. We in turn think their more elaborate statements and argument leave a picture so confused that a few of the salient points should be clarified.

1. *Nature of this suit and the theories below.*—Petitioner brought this suit on two major theories: (1) Duner was administering the assets of the C. T. C. Investment Company for the benefit of stockholders, and the petitioner as a creditor of the C. T. C. Investment Company had a prior claim (par. 39(e); R. 127); and (2) petitioner as a third party beneficiary could sue directly upon the indemnity agreement of the individual stockholders

(par. 39(d); R. 127). Both theories were urged in the lower courts and considered by the circuit court of appeals (R. 215–218, 218–221). Only the first is advanced here. The selection among alternative theories does not constitute, as one group of the respondents seems to believe (Durbin Br. in Opp. 2–5, 13), a change in theories fatal to our case.

2. *The liability of the respondent stockholders.*—The trust fund theory, if applied to support the petitioner's claim that the assets should be administered for its prior benefit, indicates the liability of the respondent stockholders [1] upon either of two grounds:

(a) If, as charged in the amended complaint (R. 125), Duner is administering the assets for the benefit of the stockholders, the petitioner is entitled under the trust fund theory as accepted by the Illinois courts to have those assets marshalled for the benefit of its prior claim. Since the indemnity agreement (R. 159) is one of the principal assets of the C. T. C. Investment Company, a decree that

[1] The repeated insistence of the respondents (Durbin Br. in Opp. 4, 5, 11, 14, 19, 20) that the stockholders received nothing as a result of dissolution is contrary both to the allegations of the amended complaint (R. 125) and the rule of law that upon dissolution the assets pass to the stockholders subject to the claims of creditors. If, as a matter of fact, Duner is administering the assets for the benefit of someone other than the stockholders and the stockholders have received nothing, this would constitute a factual defence to be pleaded in the appropriate manner.

the petitioner as a creditor is entitled to priority in distribution of the assets would appropriately be joined with a decree that the indemnitors pay over to the receiver their contractual obligation to the C. T. C. Investment Company (see R. 127).

(b) The indemnity agreement is plainly an asset of the C. T. C. Investment Company.[2] The trust fund theory embraces assets which are choses in action.[3] The creditors in recovering assets from the stockholders may bring suit upon the choses in action, else their remedy is meaningless.[4] Accordingly, if the rights represented by the indemnity agreement had in terms been distributed to the stockholders, the creditor of the corporation could sue for recovery of those rights. Duner has made no effort to collect upon the indemnity agreement. This failure to act is equivalent to a distribution of assets, by release of liability, to the stockholders

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[2] The contrary contention of the respondents (Durbin Br. in Opp. 8, 9) is untenable. The agreement by its terms (R. 159) creates an obligation from the signers to the C. T. C. Investment Company.

[3] The assets which pass to stockholders include choses in action. *Insurance Co.* v. *Dunscomb*, 108 Tenn. 724, 725–727, 736–738; *Stone* v. *Edwards*, 32 Ga. App. 479, 480, 482, 485; *Marshall* v. *Wittig*, 205 Wis. 510; *Bacon* v. *National Bank of Commerce*, 259 S. W. 244, 246 (Texas); *Norton* v. *Steinfeld*, 36 Ariz. 536, 538, 546; *Crumlish* v. *R. R. Co.*, 28 W. Va. 623, 633–634.

[4] See *Drennen* v. *Jenkins*, 180 Ala. 261; *Hightower* v. *Thornton*, 8 Ga. 486, 491–492, 503–504; *Boyd* v. *Hankinson*, 92 Fed. 49, 55 (C. C. A. 4); *Gaff* v. *Flesher*, 33 Ohio St. 107, 112–113; *Rowland* v. *Meader Furniture Co.*, 38 Ohio St. 269.

who signed the agreement. The other stockholders, of course, would have a just complaint at this disproportionate distribution. But certainly a court of equity would not refuse to trace assets rightfully belonging to creditors simply because the recipients have also been favored as against the other stockholders.

3. *The trust fund theory in Illinois.*—The respondents admit the existence of the trust fund doctrine in Illinois (Durbin Br. in Opp. 14, 22; Teter Br. in Opp. 11). They urge, however, that this traditional equity remedy is so qualified by the Illinois statutes that it is unavailable to this petitioner. The petition demonstrates that the Illinois statutes are not construed as a limitation upon the trust fund remedies of Illinois creditors. In this reply we shall suggest merely what seem to be the more important misconceptions of the respondents.

4. *Section 49 of the Chancery Act.*—This section (Pet. 14–15) is inapplicable, and does not require, as respondents urge (Durbin Br. in Opp. 29; Teter Br. in Opp. 8), that a judgment first be recovered against the C. T. C. Investment Company. The corporation is dissolved and, at least in respondent's view, is incapacitated from suit; Duner is administering the assets only for the benefit of the stockholders. Under these circumstances, section 49 does not require a judgment against the corporation. Cf. *Steere* v. *Hoagland,* 39 Ill. 264, 265–267;

Abrams v. *Roth & Co.*, 310 Ill. App. 490, 497, decided June 9, 1941. In any event, *Hill* v. *Gruell*, 42 Ill. App. 411, specifically held that section 49 did not exclude the traditional equity action to recover upon the trust fund doctrine.

5. *Section 53 of the 1919 Corporation Act.*—The requirement of this section (Pet. 13–14) as to the joinder of the corporation does not appear in the 1933 Act (cf. sec. 86 of the 1933 Act), and since it was procedural only was not preserved by section 163 of the 1933 Act (Ill. Rev. Stat. 1939, ch. 32). But even if applicable, the section would not bar an independent equity action to recover upon the trust fund doctrine. The procedure contemplated by section 53 may be available to enforce a trust fund action. See *Standard Distilling Co.* v. *Coal Co.*, 239 Ill. 600. But, as held in *Hill* v. *Gruell*, the statutory scheme is not exclusive. *Wheeler* v. *Pullman Iron & Steel Co.*, 143 Ill. 197, 204–207, advanced by respondents as holding the statutory relief to be exclusive (Teter Br. in Opp. 9), held merely that the statutory scheme for dissolution was exclusive, and is irrelevant here.

6. *Section 79 of the 1919 Corporation Act.*—This section (Pet. 14), allowing suit against stockholders within a two-year period after dissolution, as we have indicated, is applicable only to the statutory liability of stockholders, and not to their liability as trustees under the trust fund doctrine (Pet. 11). The cases relied upon by the respondents (Durbin

Br. in Opp. 27; Teter Br. in Opp. 6–7) contrary to their assertion, relate solely to the statutory liabilities of stockholders and officers. See *Dukes* v. *Harrison & Reidy,* 270 Ill. App. 372, 374, 381–382; *Consolidated Coal Co.* v. *Flynn Coal Co.,* 274 Ill. App. 405, 406, 412; *Sarelas* v. *McCue & Co.,* 291 Ill. App. 540, 542, 548–549.

7. *Other Defenses.*—The argument (Teter Br. in Opp. 3) that petitioner could not recover even if its contentions under the trust fund theory were accepted, is irrelevant here. The other issues which are raised as barring recovery were not passed upon by the court below and would appropriately be presented to that court if the case were reversed and remanded.

In short, the petitioner has consistently urged that the traditional trust fund doctrine authorizes its recovery against the stockholders who have received the assets of the C. T. C. Investment Company. This contention would point both to the appointment of a receiver to replace Duner, who has been administering the assets for the benefit of the stockholders, and to the recovery of those assets which have already been distributed through the failure to realize upon the rights represented by the indemnity agreement of the individual stockholders. The Illinois courts recognize this procedure, and hold that the statutory procedures and limitations are not exclusive of the power of an equity court to insure that creditors may realize

upon corporate assets prior to the claims of stockholders.

Accordingly, it is respectfully submitted that this petition for writ of certiorari should be granted.

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AUGUST 1941

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